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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

SERGE RUBINSTEIN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

SERGE RUBINSTEIN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals and the dissenting opinion (R. 17-27) are reported at 206 F. (2d) 449. The record also contains prior orders and opinions of the Court of Appeals (R. 7, 13-14) and a dissenting opinion (R. 14-15) and the opinion of the District Court (R. 7-10).

Jurisdiction

The judgment of the Court of Appeals was entered on June 11, 1953 (R. 27-28). The petition for a writ of certiorari was filed on August 28, 1953, and granted on Novem-

ber 9, 1953 (R. 31). The jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

Questions Presented

1. Whether a declaratory judgment (28 U. S. C. 2201) or review under the Administrative Procedure Act (5 U. S. C. 1009) is maintainable to challenge an order of deportation in an action filed subsequent to the enactment of the Immigration and Nationality Act of 1952 (8 U. S. C. 1101).

2. Whether *Heikkila* v. *Barber*, 345 U. S. 229 (1953) should be extended and applied to actions instituted subsequent to December 24, 1952, an issue expressly reserved in footnote 4 of the opinion in that case.

3. Whether, as contended by the Government, there may be no judicial review of the *validity* of a deportation order by declaratory judgment, habeas corpus, or otherwise, under 8 U. S. C. 1253(c) unless and until an alien has been in custody in excess of six months.

4. Whether the Attorney General lacks statutory power under 8 U. S. C. 1252(c) to arrest and detain an alien for deportation pending judicial review of the warrant and order of deportation and of the fairness and adequacy of the deportation proceeding.

5. Whether, upon the Attorney General's concession that the respondent is not a security risk while at large on bail pending judicial review of the deportation proceeding, it is a denial of due process of law to arrest and detain respondent for effectuation of deportation pending judicial review.

6. Whether respondent's administrative bail may be cancelled and respondent arrested and detained *for deportation* on a warrant of deportation which does not state a place of deportation and in the absence of a determination by the Attorney General of the existence of an available place of deportation.

7. Whether respondent, on the facts disclosed in his complaint and affidavit in support of his motion for preliminary injunction and in the absence of an answer or any opposing affidavit, had made out a case for a preliminary injunction.

Statement

The complaint, the affidavit in support of the motion for a temporary restraining order and preliminary injunction, and the admission of counsel for petitioner in open court that no injury to the public interest is to be anticipated from postponing respondent's arrest, have not been controverted by any answer,[1] other pleading, affidavit, or in any manner by the petitioner. The uncontroverted facts alleged in the complaint and affidavit are as follows:

The complaint alleges that respondent is a stateless native of Russia who on April 3, 1938 was admitted for permanent residence and has resided continuously in the United States since that time (R. 1). The respondent provides all the living expenses of his two minor citizen children, ages six and seven, and of his citizen mother, over seventy years of age who resides with him, and his citizen aunt, also over seventy years of age (R. 1). In April, 1939, respondent took a six to ten days round trip Caribbean cruise on the SS. Kungsholm from New York City (R. 1). On April 23, 1947 respondent was convicted of violation of § 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311) and was sentenced to imprisonment for two and one half years [*United States* v. *Rubinstein*, 166 F. (2d) 249 (C. A. 2, 1948)]. Thereafter respondent was served with a warrant of arrest in a deportation proceeding and given a deportation hearing on November 5, 1948 (while serving his full sentence in the Federal Penitentiary

[1] Following the decision of the Court below an answer was filed in the District Court which is not a part of the record on this appeal.

at Lewisburg, Pennsylvania) (R. 1-2).[2] The hearing officer who presided at the deportation hearing recommended that the warrant be cancelled and the proceeding terminated upon the ground that the respondent's crime did not involve moral turpitude (R. 2).

The complaint further alleges that the District Director of Immigration and Naturalization at Philadelphia, Pennsylvania, reviewed the proposed order to cancel the proceeding, although not authorized to do so, and filed a memorandum recommending deportation (R. 2). Thereafter, without respondent's request and contrary to his desires, the Commissioner of Immigration and Naturalization directed a hearing *de novo* which was held on October 1, 1951 (after the respondent was liberated from imprisonment).

The complaint further alleges that the presiding official at the second hearing was improperly influenced by the views of his superiors, including the District Director at Philadelphia, recommending deportation (R. 2). The hearing was required to be conducted under oath and the presiding officer administered a purported oath but was not authorized so to do by any federal or state law (R. 2). The presiding officer recommended deportation upon the ground that the crime involved moral turpitude and was committed within five years after entry in to the United States. Upon appeal the Board of Immigration Appeals of the Department of Justice ordered deportation and (pursuant to regulations, 8 C. F. R. 90.7) certified the case to the Attorney General for review of the Board's decision. The Attorney General (petitioner's predecessor) affirmed the Board's decision (R. 2).

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[2] The conviction was obtained and the deportation proceeding commenced by the Department of Justice under Attorney General Tom C. Clark and concluded under Attorney General James P. McGranery.

The complaint further alleges that in concluding to deport respondent the Attorney General, acting through his agents, considered matters outside the record of hearing available to respondent and his counsel and, upon information and belief, maintains a separate confidential file on respondent which is not available to respondent and his counsel, and received many letters, telegrams and other communications urging respondent's deportation and had his attention directed to newspaper columns urging respondent's deportation (R. 2). The complaint further alleges, upon information and belief, that the deportation order was entered and the case considered by the Attorney General and his subordinates in the light of unfavorable newspaper publicity and confidential information not disclosed to respondent, and that thus respondent was denied the rudimentary requirements of due process and elementary fairness, and the deportation hearing and order were null and void (R. 3).

The complaint further alleges that the respondent is not a citizen of any country and is stateless and has no residence or domicile in any country except the United States and has no passport or other travel documents and has no right to enter any foreign country (R. 3). The order of deportation does not specify the place to which the respondent is to be deported and is vague and null and void, and respondent has not been accorded a hearing as to the place to which he is to be deported, and the petitioner does not intend to grant him such a hearing although requested to do so (R. 3). The complaint prays for judgment that the deportation hearing was unfair, that the deportation order is null and void, that the respondent is not subject to deportation, and for an order restraining petitioner from taking respondent into custody and deporting him (R. 3).

The affidavit in support of the motion for preliminary injunction asserts that if the petitioner is not enjoined the respondent will be taken into custody and deprived of his liberty until the proceeding has been determined and thereby will be deprived of his ability to earn a living and support himself and his dependents and the Court may be deprived of jurisdiction over this declaratory judgment action (R. 5). The affidavit further sets forth, uncontradicted by petitioner, that the respondent has been granted administrative bail during the entire administrative hearing herein, that the best interests of the United States will not be adversely affected by the respondent being at large, that there has been no suggestion that respondent is hostile in any manner to the Government of the United States, or does not adhere to the principles of democracy, or has been engaged, or is engaged, or is likely to engage in any subversive activity or is engaged, or is likely to engage in any criminal or reprehensible activities (R. 5). The affidavit further states, and the petitioner does not deny, that petitioner has authorized continuation of bail for persons similarly situated during judicial review and petitioner's denial of continuation of bail herein constitutes an abuse of discretion and that respondent's detention for any period of time will result in irreparable injury and damage to him and to the business interests of corporations of which he is the president (R. 5).

On December 30, 1952 United States District Judge Pine denied a restraining order (R. 12) and upon appeal therefrom and application to the Court of Appeals for a restraining order pending appeal counsel for petitioner stated to the Court of Appeals "that no injury to the public interest is to be anticipated from postponing the Appellant's (respondent here) arrest" (R. 14). An order of the Court of Appeals of December 31, 1952 granted a restraining order pending appeal (R. 14).

An order of the Court of Appeals of January 5, 1953 remanded the case to the District Court for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings and continued the restraining order until further order of the District Court (R. 7). On January 23, 1953 United States District Judge Letts filed an order denying the motion for preliminary injunction (R. 11) and immediately agents of petitioner sought to arrest respondent pending the application to Judge Letts for a stay pending appeal which was denied on January 23, 1953 (R. 12) and the application to the Court of Appeals for a stay pending appeal which was granted by an order of January 26, 1953 (R. 13-14).

The Rulings Below

The District Court denied the preliminary injunction herein upon the following three grounds: (1) That the complaint was not verified, that the supporting affidavit was not made upon personal knowledge and that such affidavit was merely "a restatement of matters set forth in the complaint." (2) That the only issue of substance was whether Rubinstein's crime (for which deportation is here sought) involved moral turpitude and that since all crimes do which are contrary to justice and modesty (as well as crimes merely malum prohibitum), Rubinstein committed a deportable offense when he was convicted of violation of 50 App. U. S. C. 311. (3) That preliminary injunctions should only be granted where there is reasonable certainty that complainant must succeed at final hearing (R. 7-10).

The Court of Appeals reversed the District Court by a divided court (R. 17-27). (1) The majority, tracing the legislative history of the 1952 Immigration and Nationality Act, distinguished *Heikkila* v. *Barber*, *supra*, and held that a deportation order might be tested in the present declaratory judgment action. No dissent was recorded on this

issue (R. 18, 25). (2) It was further held that 8 U. S. C. 1252(c) [Section 242-c of the 1952 Act] did not authorize respondent's arrest because it became operative only after completion of judicial review where litigation had been instituted. (3) The majority of the Court of Appeals accepted the undenied allegations of the complaint and motion and noted that the record shows "no reason for the order of arrest" and held that respondent's arrest under 8 U. S. C. 1252(a) would therefore be an abuse of discretion in the light of *Carlson* v. *Landon*, 342 U. S. 524 (1952). (4) The majority also found that if equities were to be balanced, "the record contains nothing that could outweigh the irreparable loss of personal liberty which would follow" the unjustified and illegal threatened detention of respondent for deportation. (5) Finally, the Court of Appeals ruled that whether respondent was guilty of a crime involving moral turpitude was (R. 24-25):

> "only one of the issues raised by the complaint on which the validity of the deportation order will depend. To avoid piecemeal appeals, we shall not consider this issue until the others have been heard. The case is accordingly remanded to the District Court for further proceedings, with directions to issue a preliminary injunction. . . ."

The dissent believed that there was jurisdiction to issue a preliminary injunction based upon the Court's "general powers to preserve pendente lite its jurisdiction over the case or prevent irreparable injury." It assumes that the Attorney General will not (R. 27) "go forward with deportation pending final determination of judicial review", that the Attorney General desires merely to interview respondent at Ellis Island "to adjust the terms of Rubinstein's release in view of the deportation order" and that therefore injunctive relief is premature. The dissent also con-

cludes that the moral turpitude issue is the sole substantial basis for attacking the deportation order and that it must fail.

Statutes and Regulations

The applicable statutes and regulations are set forth in the appendix to this brief at pages 72 to 76.

Summary of Argument

On December 29, 1952, when the respondent was ordered deported, the adjudicatory process herein came to an end. At that point a justiciable controversy existed between adverse parties with issues ripe for judicial intervention and appropriate for declaratory judgment. Whatever doubts may exist as to the soundness of *Heikkila* v. *Barber*, 345 U. S. 229 (1953) which expressly reserved the issue presented herein, it is clear from the legislative history of the 1952 Immigration Act and its language, as noted by the Court below, that the instant action filed on December 30, 1952 may be maintained under the Declaratory Judgment Act (28 U. S. C. 2201) and under Section 10 of the Administrative Procedure Act (5 U. S. C. 1009).

Both the majority and minority of the Court below found that the action herein was maintainable. The minority opinion concedes that injunctive relief is within the Court's jurisdiction to preserve the *status quo* or to prevent irreparable injury. We submit that the majority opinion correctly concluded upon the undenied allegations of the pleadings that the Attorney General was seeking to take respondent into custody for the purpose of effectuating deportation pursuant to 8 C. F. R. 243.2 (1952) although no place of deportation is available.

Pending judicial review, the *status quo* should not be disturbed. No proper purpose will be served by respond-

ent's detention pending final determination of the instant case upon its merits.

Upon the record herein, the complaint and affidavit in support of respondent's application for an injunction, the following appears: (1) Respondent will not constitute a danger to the public interest if permitted at large. (2) No claim is made that he will not appear when wanted. (3) No denial is made of paragraph 10 of the affidavit filed herein that in similar cases administrative bail is continued pending judicial review (R. 5). (4) The Attorney General is seeking to take respondent into custody pursuant to an incomplete, and therefore void, warrant of deportation which does not state the place of deportation. (5) The Attorney General presently has no place to which he proposes to deport respondent. (6) The Attorney General has not granted respondent a hearing upon his claim that he will be physically persecuted if returned to Russia and according to paragraph 33 of the complaint has no intention of granting him such hearing although required to do so pursuant to 8 U. S. C. 156(a), 1253(b). (7) The allegations of the affidavit submitted in support of the application for relief herein have not been controverted by any opposing affidavit. (8) No answer has been filed to the complaint. (9) Where judicial review is sought, the six-month period of Section 242(c) of the 1952 Act (66 Stat. 210; 8 U. S. C. A. 1252c) begins to run only after the conclusion of such judicial review and therefore that section does not presently empower the Attorney General to detain respondent.

The principles by which the legality of detention herein should be determined are expressed in *Carlson* v. *Landon*, 342 U. S. 524 (1952). These principles are that the due process clause of the Fifth Amendment requires that an alien be granted reasonable bail pending effectuation of

deportation unless he is a danger to public security or about to abscond. The Attorney General concedes that these conditions are not present here. The cases hold that revocation of bail without adequate reasons proved in court by the Government is arbitrary, capricious and unconstitutional.

In addition to a conceded lack of any public security reason for revoking bail, there is the compelling additional reason in this case that it is capricious to detain an alien as incident to deportation when the Attorney General concededly has not found a place to which the alien may be deported and has not named a place of deportation in the warrant of deportation. Detention in such circumstances is arbitrary, unconstitutional and unlawful punitive executive action. Moreover the case presents substantial legal questions on the validity of the order of deportation and the fairness of the administrative hearing.

The Court of Appeals therefore properly found that an injunction should issue because the threatened revocation of bail was arbitrary, and because upon balance, the equities favored maintaining the *status quo*. Its conclusion that the Attorney General had no absolute, capricious or dictatorial powers to detain respondent, as contended by petitioner, was likewise correct. *U. S. ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109 (C. A. 2, 1953); *U. S. ex rel. Nukk* v. *District Director*, 205 F. 2d 242 (C. A. 2, 1953); *Yanish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (1953).

Point I

The District Court Has Jurisdiction of This Action

The Government's argument is that the provision of § 242(b) of the 1952 Act that "the decision of the Attorney General shall be final" prohibits this action because similar language of § 19 of the Immigration Act of 1917 has been held to prohibit such an action. *Heikkila* v. *Barber*, 345

U. S. 329. The respondent contends that the whole text and history of the 1917 Act is entirely different from the text, historical background, and legislative history of the 1952 Act in which is disclosed the intent of Congress that this action, as well as *habeas corpus*, shall be available to review deportation orders.

Heikkila v. *Barber*, 345 U. S. 229 (footnote 4) expressly states that "we do not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed." Moreover the opinion emphasizes that the historical background of the 1917 Act was the basis of its conclusion that, prior to the 1952 Act, *habeas corpus* was the exclusive remedy for judicial review of a deportation order. The opinion carefully observed:

> "• • • Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.
>
> That the Attorney General's decisions are 'final' does not settle the question. The appellant properly emphasizes the ambiguity in that term.
>
> • • • • • • •
>
> Read against this background of a quarter of a century of consistent judicial interpretation, Section 19 of the 1917 Immigration Act, 39 Stat. 890, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution.
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> • • • • • • •
>
> • • • In short, it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act."

The instant action arises upon a deportation order of December 29, 1952, and a complaint for injunctive and declaratory relief filed December 30, 1952, both subsequent to December 24, 1952, the effective date of the 1952 Act (Sec. 407; 66 Stat. 281). Read against its historical background the 1952 Act is not a statute precluding judicial review and therefore that this action may properly be maintained.

A. This Action Is Not Governed by the 1917 Immigration Act

The present action was instituted on December 30, 1952 (R. 1). The effective date of the 1952 Act was December 24, 1952 (66 Stat. 281). Section 405(a) of the 1952 Act (66 Stat. 280), however, provides that "as to all such prosecutions, suits, actions [pending when the 1952 Act became effective] * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided herein, hereby continued in force and effect". It is clear that Congress intended that judicial proceedings instituted before December 24, 1952, like *Heikkila's* action, should be governed by the repealed immigration laws and that judicial proceedings commenced thereafter, like this action, should be governed by the 1952 Act. Except to the extent of the saving clause, the repeal of the 1917 Act eradicated its effect on the jurisdiction of the federal courts to entertain this action. *Avina* v. *Brownell*, 112 F. Supp. 15 (S. D. Texas 1953); *Vasquez* v. *Brownell*, 113 F. Supp. 722 (W. D. Texas, 1953); *D'Argento* v. *Dulles*, not officially reported, Pike and Fischer, Administrative Law, 2nd, 623 (Dist. of Col., 1953); *In re Yoshida*, 113 F. Supp. 631 (D. Hawaii, 1953). Cf. *Bruner* v. *United States*, 343 U. S. 112 (1952).

Thus Congress directed an orderly transition from the old to the new law. The Government, indeed, agrees with respondent that the 1952 Act governs this action.[3]

B. The 1917 Act and Its Background

At the outset it warrants emphasis that in the *Heikkila* decision this Court was determining the intent of Congress in repeating language in *1917* which had been used in former statutes and already at that time had been construed by this Court as "precluding judicial intervention in deportation cases except insofar as it was required by the Constitution". The question considered in the *Heikkila* case was whether Congress in 1946 in § 10 of the Administrative Procedure Act intended by implication to amend the 1917 Act as interpreted up to that time to provide for "judicial review" of deportation orders in the present type of civil action. On that question this Court determined that Congress did not intend in 1946 to subject such deportation orders to the "scope of review" of § 10(e) namely, substantial evidence on the whole record to support the deportation order, stating "In short, it is the scope of inquiry on *habeas corpus* that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act". Therefore this Court treated deportation orders as

[3] The savings clause preserved the process of administrative adjudication under the 1917 Act for cases instituted thereunder. Judicial review however is governed under the new law, unless pending upon the effective date of the 1952 Act and therefore preserved under the savings clause. It could not be maintained that the old law applied exclusively simply because the ground of deportation, which is a ground of deportation under both the old [Sec. 19(a) of the 1917 Act] and the new law [Sec. 241 (a)(4) of the 1952 Act], was originally asserted by the Attorney General against respondent under the old law. Such a contention would render inapplicable to all deportation proceedings pending on December 24, 1952 the numerous procedural provisions of the 1952 Act with respect to execution of deportation orders and control of aliens pending deportation (Secs. 242 and 243 of the 1952 Act) which the Government asserts are applicable to all such cases.

agency action within the first exception of § 10 of the 1946 Act concerning which "statutes preclude judicial review". We adopt the views set forth in petitioner's brief in *Tom We Shung* v. *Brownell* (No. 241, October Term, 1953), with respect to the soundness of the *Heikkila* decision. However, accepting the validity of the *Heikkila* case, *arguendo*, it is submitted that the circumstances surrounding the enactment of the 1952 Act disclose an intent by Congress not to preclude judicial review and not to confine deportation orders to judicial scrutiny solely in *habeas corpus* proceedings.

C. The 1952 Act and Its Background

This Court expressly recognized in the *Heikkila* decision that the ambiguous administrative "finality" clause in a statute does not determine the mode or scope of judicial scrutiny of administrative decision and that the entire text and history of the particular statute must be examined. Congress reenacted the finality clause of the 1917 Act according to *Heikkila* v. *Barber*, *supra*, against the background of consistent judicial interpretation precluding judicial intervention except in *habeas corpus*. But the finality clause of the 1952 Act was enacted against an entirely different background including express recognition of judicial review in the text of the statute and against a background of an opposite judicial construction.

To exclude judicial review under § 10 of the Administrative Procedure Act, the statute excluding such review should make such an intention clear upon its face.[4] Section 12 of the Administrative Procedure Act (5 U. S. C. 1011) requires express statutory language in subsequent legislation to

[4] The House and Senate reports upon the bill which became the Administrative Procedure Act (*House Report 1980*, p. 41 and Senate Document 248, p. 275, 79th Congress, 2d Session) stated: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."

secure an exemption from any of its provisions. (See also: *House Report 2140*, 80th Congress, 2nd Session, p. 1). The 1952 Immigration Act contains no such specific exemption, although previous bills introduced in the 80th and 81st Congress relating to this subject, had sought such exemption by express language. The 1952 Act not only does not give clear and convincing evidence of an intent to withhold judicial review under the 1946 Act but on the contrary both the text and legislative history of the 1952 Act makes it clear that such judicial review was recognized and sanctioned.

1. Section 242 of the 1952 Act (8 U. S. C. 1252) which contains the finality clause in subsection (b) also expressly contemplates in subsections (c) and (e) that there shall be "judicial review" of deportation orders and provides for control of the alien during the six months period from the final order of the court "if judicial review is had" and thereafter. The text of this section clearly distinguishes between judicial review of deportation orders, which Congress recognizes must postpone actual deportation, and judicial authority in *habeas corpus* to "review or revise any determination of the Attorney General" concerning detention, parole or release of an alien pending determination of deportability (subsection (a)), or for six months after completion of judicial review of the deportation order (subsection (c)). Thus the text of the 1952 Act, unlike the 1917 Act which has no such provisions recognizing judicial review and qualifying the finalty clause, resolves the ambiguity in the finality clause by expressly recognizing the existence of judicial review.[5]

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[5] The distinction between judicial review of deportation orders and review of detention in habeas corpus is recognized not only by Congress in § 242 but also by this Court. *Heikkila* v. *Barber*, 345 U.S. 329 (1953); *Estep* v. *United States*, 327 U.S. 141 (1946); *Sunal* v. *Large*, 332 332 U.S. 177 (1947); *Bridges* v. *Wixon*, 326 U.S. 135, 167 (1945).

2. Section 242(b), unlike the 1917 Act, further evidences the Congressional intention to permit judicial review of deportation orders by the provision that deportation proceedings shall be conducted in accordance with regulations of the Attorney General which shall include a requirement that "(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Thus Congress adopted for deportation hearings substantially the same rule as that provided for agency hearings by § 7(c) of the Administrative Procedure Act which provides that no order shall be issued except "as supported by and in accordance with the reliable, probative and substantial evidence" (5 U. S. C. 1006). It is submitted that the use of this language in § 242(b) strongly implies the intent of Congress to subject deportation orders to ordinary judicial review, not limited to *habeas corpus*, to determine whether they are based upon reasonable, substantial and probative evidence.

In this connection it may be noted that to the extent that Congress did not wish deportation hearings to be governed by the Administrative Procedure Act it made express provision. Section 242(b), between the sentence providing the substantial evidence rule and the sentence providing the finality clause, provides that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."[6] Thus Congress, where it so intended, expressly excluded application of administrative hearing procedure provided by §§ 5,

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[6] This language was adapted from § 242(b) of the first Senate omnibus immigration and nationality bill (S. 3455, 81st Cong., 2nd Sess.), which became § 242(b) of the 1952 Act, expressly providing that "Notwithstanding any other law, including the [Administrative Procedure] Act of June 11, 1936 (60 Stat. 237), the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States".

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7 and 8 of the Administrative Procedure Act.[1] The failure similarly to exclude the judicial review procedure of § 10 of the Act strongly implies that this judicial review procedure of deportation orders was not excluded by Congress. It might be suggested that the 1952 Act requirement of substantial evidence, not present in the 1917 Act, is a mere exhortation by Congress to the Attorney General not intended to modify the finality clause and subject the deportation order to the customary judicial review of the question whether the order is supported by reasonable, substantial and probative evidence. This, however, would be a very strained construction of § 242(b) to endow the finality clause with an absolute quality at the expense of the rest of the language in the section. The natural construction is that Congress intended that deportation orders should be subject to the usual judicial review to determine whether they are supported by reasonable, substantial and probative evidence. Any concession that Congress did intend by this statutory provision court review of sufficiency of evidence to support deportation orders but only in *habeas corpus* proceedings would constitute in effect an abandonment of the argument that the finality clause expresses an intent to limit judicial examination to something less than "judicial review" and the substitution of an argument that the finality clause merely expresses the Congressional intent in respect of the mode of review by *habeas corpus* rather than the scope of review. On this question of what did Congress intend by the finality clause, coupled in the 1952 Act with

[1] Prior to the 1952 Act, in order to nullify *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), holding §§ 5, 7 and 8 of the Administrative Procedure Act applicable in deportation proceedings, the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) expressly made these sections not applicable to "exclusion or expulsion of aliens * * *." Because § 242(b) dealt with this matter directly the provision of the 1951 Act was repealed by the repealer section, § 403(a)(47), of the 1952 Act (66 Stat. 279).

other language implying judicial review, there is no basis for concluding that the finality clause was intended to dictate the procedural mode of judicial examination rather than the scope of judicial review. To the extent that the finality clause in the context of the 1952 Act is anything more than a vestigial carryover from the 1917 Act and expresses an intent of Congress, the intent is that the Attorney General's decision is the final administrative decision subject, however, to the judicial review contemplated by § 242 and other sections of the 1952 Act.

3. In the 1952 Act Congress made express provision when it intended that the Attorney General's final determination could be reviewed by *habeas corpus* and not otherwise. Section 360(c) [8 U. S. C. 1503(c)] expressly withdraws the remedy of declaratory judgment (28 U. S. C. 2201) from persons outside the United States claiming a right or privilege as nationals of the United States. Such persons, provided they have been physically present in the United States or are under sixteen years of age and were born abroad of an American citizen parent, are relegated to the procedure applicable to an alien seeking admission and the Attorney General's final determination that such person is not entitled to admission "shall be subject to review by any court of competent jurisdiction in *habeas corpus* proceedings and not otherwise."[8] The Court below correctly pointed out that "The fact that Congress said clearly what it meant in

[8] The prior law, § 503 of the Nationality Act of 1940, 8 U.S.C. 903, authorized any person, in or out of the United States, claiming a right or privilege as a national of the United States to bring an action in a district court for a judgment declaring him to be a national of the United States. The 1952 Act restricts such actions to persons within the United States and permits only a limited class of persons outside the United States to obtain certificates of identity to apply for admission at a port of entry. No provision is made for any person abroad claiming to be a national of the United States who has not been physically in the United States or who is not a person under sixteen years of age born abroad of a United States citizen parent.

§ 360(c) with regard to admission is strong evidence that it did not mean what it did not say in § 242(c) with regard to deportation" (R. 21). The Government, however, argues (Br. 38) that § 360(c) has nothing to do with ordinary exclusion cases and implies that the Court below said or thought that it did and that therefore reliance on § 360(c) was mistaken. The Court below, however, did not say or imply that § 360(c) applies to *all* persons seeking admission to the United States but merely points out that when Congress intended in the 1952 Act to restrict review of a class of final determinations of the Attorney General to *habeas corpus* it expressly said so.

4. The 1952 Act was enacted against a background of judicial interpretation entirely different from that of the 1917 Act. Three Courts of Appeals ruled between February 16, 1948 and November 17, 1950 that Congress intended to subject deportation orders to review under § 10 of the Administrative Procedure Act of 1946. *U. S. ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3, 1948); *Kristensen* v. *McGrath*, 179 F. 2d 796 (C. A. D. C., 1949), affirmed *McGrath* v. *Kristensen*, 340 U. S. 162 (1950); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3, 1950); *Prince* v. *Commissioner*, 185 F. 2d 578 (C. A. 6, 1950). Reenactment of the finality clause in the 1917 Act was considered by this Court in the *Heikkila* decision as adoption of the judicial construction placed on the finality clause prior to 1917. Equally, enactment of the finality clause in the 1952 Act should be construed as approval of the unanimous construction that had been placed on the statute by the Courts of Appeals and under which hundreds or possibly thousands of cases had been instituted seeking judicial review of deportation orders under the Declaratory Judgment Act and the Administrative Procedure Act. Under the applicable rule of statutory construction Congress impliedly accepted the

construction of the Courts of Appeals when it reenacted the finality clause in the 1952 Act.

Moreover, the 1952 Act was enacted against the background of a legislative practice which developed in recent years and long after 1917 as part of the expanding field of administrative law and judicial control thereof, under which Congress has not expressed its intention to bar judicial review merely by reference to the finality of administrative decisions but only by explicit language expressly barring judicial review. *Estep* v. *United States*, 327 U. S. 114, 120 (1946); *Reynolds* v. *United States*, 292 U. S. 443 (1934); *United States* v. *Williams*, 278 U. S. 255 (1929). See also Davis, *Administrative Law* (1951), p. 839. See for examples of express prohibition of judicial review where that is the intention of Congress § 601(c) of the Revenue Act of 1936, 49 Stat. 1740, making the Commissioner's determination final with respect to certain special refunds and providing "no court shall have jurisdiction to review such determination"; § 11 of the Act of October 17, 1940, 54 Stat. 1197 (38 U. S. C. 11a-2) providing that "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits * * * shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." *Van Horne* v. *Hines*, 122 F. 2d 207 (C. A. D. C., 1941). Another example is § 9 of the Act of March 7, 1941, 55 Stat. 26 [26 U. S. C. 732(c)] providing that certain determinations of the Board of Tax Appeals in respect of the calculation of the excess profits tax shall be final and "shall not be reviewed or redetermined by any court or agency except the Board."

D. Legislative History of the 1952 Act

The qualification of the finality clause in the 1952 Act, disclosed by the text of the statute and the modern legis-

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lative practice of explicitly barring judicial review where that is intended, is also expressly supported by the legislative history of the 1952 Act. Examined chronologically the legislative history discloses that Congress intended review of deportation orders pursuant to § 10 of the Administrative Procedure Act.

1. *The Hobbs bill.* After this Court's decision in *Sung* v. *McGrath*, 339 U. S. 33 (1950), the Immigration Service instituted efforts to secure full exemption from the examiner and review provisions of the Administrative Procedure Act. H. R. 6652, 80th Congress, 2d. Session, sought to relieve the Immigration Service from all provisions except the public information section. The House Judiciary Committee took specific note of the *Trinler* decision, *supra*, in favorably reporting this bill (*House Report 2140*, 80th Congress, 2d. Session, pp. 2, 6). Efforts continued to secure review and hearing examiner exemption with the introduction of the so-called Hobbs Bill in the 81st Congress, 1st Session (H. R. 10), which sought to grant specific exemption from section 10 of the Administrative Procedure Act and the Declaratory Judgment Act. (*House Report 1192*, 81st Congress 1st Session, p. 4).

In his recommendation for favorable action on H. R. 10, Mr. Justice Clark who was then Attorney General, assumed that declaratory judgment and review under the Administrative Procedure Act was then available in immigration cases. In a letter of May 20, 1949, the then Attorney General stated (*House Report 1192, supra*, p. 13):

> "Section 5 would enumerate certain circumstances under which provisions of the Administrative Procedure Act and the Declaratory Judgment Act of 1934 shall not be applicable to certain immigration and nationality statutes * * *"

H. R. 10 passed the House of Representatives. In the Senate, the bill failed of enactment after the Senate Judi-

ciary Committee had eliminated the foregoing Section 5. (*Senate Report 2239*, 81st Congress, 2d. Session).

Efforts to confine judicial review exclusively to *habeas corpus* by express language was made in Section 6 of S. 1832 (Senate Report 2230), 81st Congress, 2d. Session. The text of this section was later reintroduced as Section 106 of S. 3455, 81st Congress, 2nd Session. (See *infra*, notes 9 and 10).

Note should also be made that when the Immigration Service finally secured an exemption from the Administrative Procedure Act in the 1951 Supplemental Appropriations Act (P. L. 843, 81st Congress; 64 Stat. 1048), it was limited to Sections 5, 7 and 8. It did not include Section 10 of the Administrative Procedure Act.

2. *The original bills.* On April 20, 1950 Senator McCarran introduced the first omnibus bill to revise the immigration laws (S. 3455, 81st Cong., 2nd Sess.) which expressly provided in § 106 that determinations of fact should not be subject to review by any court and that determinations of law should not be subject to review by any court except through the writ of habeas corpus.[9] Similar provisions were contained in a revised bill, S. 716, introduced by Senator McCarran on January 29, 1951 (82nd Cong., 1st Sess.) and in H. R. 2379, introduced by Congressman Francis Walter on February 5, 1951 (82nd Cong., 1st

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[9] "Sec. 106. Notwithstanding the provisions of any other law—

(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

Sess.).[10] H. R. 2816 (82nd Cong., 1st Sess.), an omnibus bill introduced by Congressman Celler on February 22, 1951, omitted § 106 and contained no other comparable section restricting judicial review.

3. *Senate Report No. 1515 (81st Cong., 2d Sess.).*—The Government repeatedly (Br. 23, 33, 35) relies on the statement in this report (p. 629) submitted on April 20, 1950, when S. 3455, *supra*, was introduced, to the effect that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." This statement that habeas corpus is the proper remedy to determine the legality of the detention of an alien in custody is not the equivalent, as the Government claims (Br. 33), of a statement that habeas corpus is the exclusive remedy for the review of a deportation order in respect of an alien not in custody. Obviously if an alien is in custody habeas corpus is a remedy to determine the legality of the detention, as in *Carlson* v. *Landon*, 342 U. S. 524 (1952), but that is quite a separate matter from judicial review of the legality of a deportation proceeding and the deportation order. Moreover, even if S. Rep. 1515 meant what the Gov-

[10] Section 106 of S. 716 and H.R. 2379 provided:

"Sec. 106. (a) Notwithstanding the provisions of any other law—

(1) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(2) determinations of law other than with respect to liability for the payment of deportation, detention, and related expenses by vessels, aircraft, or other transportation lines, or the master, commanding officer, owner, agent, or consignee thereof, or the imposition of fines and penalties by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(3) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court.

(b) Nothing in subsection (a) of this section shall be held to apply to court proceedings instituted under section 360 of this Act."

ernment says it means it would merely reflect approval of § 106 of S. 3455, barring review except by habeas corpus, which was later eliminated from the bill and from the 1952 Act.[11]

4. *Hearings on the bills.*—Joint hearings were held on these three bills and representatives of numerous organizations recorded their opposition to the provisions restricting judicial review and urged the continued application of § 10 of the Administrative Procedure Act. These organizations included representatives of the American Bar Association, American Civil Liberties Union; Americans for Democratic Action, American Jewish Committee, Association of Immigration and Nationality Lawyers, Common Council for American Unity, and National Catholic Welfare Conference.[12] *Joint Hearings Before the Sub-Committees of the Committees on the Judiciary on* S. 716, H. R. 2379, H. R. 2816, pp. 144, 446, 536-7, 591, 617, 699, 735, 739. It was understood that elimination of § 106 would leave § 10 of the Administrative Procedure Act applicable.

5. *The revised bills.*—The revised omnibus bills introduced later in the 82nd Congress, 1st Session (S. 2055,

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[11] In the interest of a complete record, although no reliance is placed on the point, it may be noted that it is not clear that S. Rep. 1515 represents the views of the entire Senate Committee on the Judiciary. It is noted that throughout the Report various recommendations and conclusions are stated to be those of the Special Sub-Committee to Investigate Immigration and Naturalization. Pages 332, 407, 412, 454, 510, 588, 609.

[12] The representative of the American Bar Association (Mr. Wasserman) stated (pp. 536-7):

> "We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act."

The statement on behalf of the National Catholic Welfare Conference states (p. 735):

> "4. Section 106: It is our conviction that administrative decisions should not necessarily be final; rather that immigration and naturalization cases have the benefit of review by the courts as presently applies under the Administrative Procedure Act."

introduced by Senator McCarran on August 27, 1951 and H. R. 5678, introduced by Congressman Walter on October 9, 1951), and a subsequent revised omnibus bill introduced in the 82nd Congress, 2nd Session (S. 2550, introduced by Senator McCarran on January 29, 1952) eliminated § 106 of the prior bills and neither the prior § 106 nor its provisions appear in the 1952 Act. This elimination of § 106, in the light of the Joint Hearings, discloses the clear intent to continue judicial review under the Administrative Procedure Act as it was then practiced and understood.

S. 2842 (82nd Cong., 2nd Sess.), introduced on March 12, 1952 by Senator Humphrey for himself and twelve other Senators, was an omnibus bill differing in several respects from the McCarran and Walter bills but similar in the respect that it did not contain the eliminated provisions for the restriction of judicial review in former § 106.

6. *Senate Report 1137.*—The report of the Committee on the Judiciary (Report No. 1137, 82nd Cong., 2nd Sess.) submitted to the Senate on January 29, 1952 on S. 2055, explained that the elimination of the provisions contained in § 106 of the former bills was (p. 28) "not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law". It is submitted that the existing law at that time, as understood by both the Members of Congress and the Bar generally, was the then well-known *Trinler* doctrine under which judicial review could be had not only by habeas corpus but also by an action or proceeding conforming to § 10 of the Administrative Procedure Act of 1946. This is made clear by the statement immediately following the above quotation from the report to the effect that the problem intended to be met by the language of the eliminated § 106 was solved by §§ 101(b)(4), 236 and 242(b) of S. 2055 (same sections in the 1952 Act) which make it clear that special inquiry

officers conducting exclusion and deportation hearings are governed by the special procedures of the 1952 Act rather than by the general administrative procedures required by §§ 5, 7 and 8 of the Administrative Procedure Act of 1946.[13] It is submitted that this report discloses the intention of Congress to eliminate the application of §§ 5, 7 and 8 of the 1946 Act but to continue review of deportation orders under § 10 of the 1946 Act as it then existed.

7. *House Report 1365.*—On February 14, 1952 the Committee on the Judiciary submitted its report (No. 1365, 82nd Cong., 2nd Sess.) on H. R. 5678 to the House and stated (p. 28) that the bill "7. Safeguards judicial review and provides for fair administrative practice and procedure (§§ 235, 242 and 360)." The report contains a discussion of the elimination of former § 106 (pp. 55-56) similar to that quoted above contained in S. R. 1137.

The Government's argument (Br. 22) that the elimination of § 106 merely eliminated any additional restrictions

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[13] The text of Report No. 1137, discussed above, reads as follows:

"In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. The omission of the language is not intended to grant any review of determination made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law. The problem intended to be met by the language of the two predecessor bills *in relation to the administrative process* is solved by the language of sections 101(b)(4), 236 and 242(b) of the instant bill. Under the provisions of those sections, special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, under which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. These procedures are made the sole and exclusive ones in such matters. The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.) is specifically repealed since the special procedures in the bill make such exemption no longer necessary." (Emphasis supplied)

on review in habeas corpus fails to meet the fact that both the hearings and the subsequent report contemplated that although special provisions in § 242(b) superseded §§ 5, 7 and 8 of the Administrative Procedure Act "in relation to the administrative process". Section 10 of that Act continued to be applicable in respect of judicial review of the administrative process.

8. *House debate.*—On April 24, 1952, during the House debate on the bill (H. R. 5678), Congressman Meader proposed an amendment to the provision of § 242(b) that the Attorney General's decision shall be final, to the effect that the order of deportation shall be subject to court review (98 Cong. Rec. 4415). Congressman Walter, co-author of the bill and of the Administrative Procedure Act, opposed this amendment as surplusage [14] and stated clearly that § 10 of the Administrative Procedure Act is applicable in the following statement (p. 4416):

> "Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable." [15]

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[14] Answering an objection of the C.I.O. that the bill would emasculate judicial review Congressman Walter also declared (p. 4302):

> "The Administrative Procedure Act—do you remember the old Walter-Logan bill, which was subsequently enacted into law as the Administrative Procedure Act? Why, this question of unbridled authority in one person is almost an obsession with me. I am the last person in the world who would do anything to destroy the philosophy underlying that type of review."

[15] Immediately after this statement Congressman Walter went on to say that in addition to judicial review under § 10 of the 1946 Act the 1952 bill incorporated the philosophy underlying the 1946 Act which provides for fair administrative procedures as well as for judicial review of administrative action.

The Government attempts to nullify Congressman Walter's express statement that "Section 10 of the Administrative Procedure Act is applicable" by dismissing it as "based upon a serious misunderstanding as to the operation of the bill" (Br. 25). Congressman Walter is a member of the Bar and completely familiar with both the Administrative Procedure Act and the immigration bills when he made this statement. Any misunderstanding is the Government's misunderstanding of his statement by confusing what he said about § 10 with what he subsequently and separately said about §§ 5, 7 and 8 of the Administrative Procedure Act. It must be kept in mind that his statement was an extemporaneous oral explanation made in the course of floor debate. So read it is clear that Congressman Walter, first answering Congressman Meader's concern about judicial review, then separately went on to remark that in addition to judicial review under § 10 the substance of the administrative procedural safeguards of §§ 5, 7 and 8 had been embodied directly in § 242(b) of the immigration bill. Moreover, any momentary misunderstanding thought to be contained in Congressman Walter's extemporaneous remarks was plainly confined to the question whether §§ 5, 7 and 8 of the 1946 Act and the *Sung* decision, rather than § 10, involved judicial review. There was no misunderstanding or confusion whatever by Congressman Walter on the question presented here which is the affirmative intent of Congress to provide for judicial review of deportation orders by § 10 of the Administrative Procedure Act as he expressly stated.

9. *Senate debate.*—On May 21, 1952 in the Senate debate Senator McCarran, author of the bill, insisted that it was intended to continue the application of the Administrative Procedure Act except for the similar special provisions in respect of the conduct of exclusion and deportation pro-

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ceedings by special inquiry officers. Senator McCarran observed (p. 5717):

> "Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act.
>
> • • • • • • •
>
> "Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act."

On the following day Senator McCarran stated (p. 5778):

> "the Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails **now.**
>
> • • • • • • • •
>
> "The bill provides for administrative procedures and makes the Administrative Procedure Act applicable insofar as the administration of the bill is concerned."

It was upon these assurances that many Senators voted in favor of the bill.

It is submitted that the elimination of provisions barring judicial review, the committee reports, and statements on the floor of Congress by the authors of the bills which became the 1952 Act, disclose the understanding that judicial review of deportation orders was provided as it then existed in actual practice pursuant to §10 of the Administrative Procedure Act. The fact that the Supreme Court subsequently determined that such judicial review was not available under the 1917 Act does not alter the fact that Congress plainly understood that it would be available under the 1952 Act.

The Government seeks support (Br. 28) in the rejection of Senator Morse's proposed amendment to §242(b) of the bill to make the administrative hearing provisions of the Administrative Procedure Act applicable to exclusion and deportation proceedings and also to provide expressly for judicial review of exclusion and deportation orders by declaratory judgment actions (28 U.S.C. 2201) as well as by habeas corpus (98 Cong. Rec. 5781, 5630). Senator McCarran's expressed opposition to this amendment on the ground that it would make exclusion orders reviewable by declaratory judgment actions (98 Cong. Rec. 5789) does not support the inference that the rejection of the amendment discloses the understanding of Congress that deportation orders were not reviewable under §10 of the Administrative Procedure Act. [16]

10. *Conference Report.*—The statement of the Managers on the part of the House which accompanied the conference report of the Committee of Conference on the disagreeing votes of the two Houses on the amendment of the Senate to H. R. 5678 (House Report No. 2096, 82nd Cong., 2nd Sess. of June 9, 1952) states (p. 127):

> "(2) Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings."

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[16] The Government gains no support from rejection of the amendments proposed by Senators Lehman and Moody because these amendments were rejected on the basis of provisions other than those pertinent to judicial review. Moreover, views of opponents of the bill are not enlightening on the intent of Congress. *National Labor Relations Board* v. *Thompson Products*, 141 F. 2d 794, 798 (C.A. 9, 1944).

Thus, after extensive consideration of the bill in committees and on the floor of Congress it was agreed that in respect of judicial review the bill provided procedures within the framework and pattern of the Administrative Procedure Act. It is submitted that this statement can only mean that Congress understood deportation orders were subject to judicial review pursuant to §10 of the Administrative Procedure Act.

E. Practical Considerations

The Government argues (Br. 39-40) that the decision of the Court below suggests that exclusion orders as well as deportation orders may be judicially reviewed in proceedings other than habeas corpus. The Court below did not so state and it does not necessarily follow that because deportation orders under § 242 (8 U. S. C. 1252) are subject to judicial review, contemplated by the text of that section, exclusion orders under §236 (8 U.S.C. 1226) are similarly subject to judicial review. The finality clause of §236(c) unlike the finality clause of §242(b), is not qualified either by a direct reference to "judicial review" in the text of §236 or by a requirement that no decision of exclusion shall be valid unless based on reasonable, substantial, and probative evidence.

Moreover, even if no distinction were made in respect of the mode and scope of judicial review of exclusion and deportation orders, it does not follow that Congress did not intend any such review. If, as respondent contends, Congress did intend that deportation orders would be reviewable under §10 of the Administrative Procedure Act it does no violence to the text of the statute or the expressed intention of the statute to review exclusion orders in the same manner unless and until Congress chooses to amend the law. It does not appear that such review of exclusion

orders would burden the courts any more than habeas corpus proceedings, or would result in any improper interference with an excluded alien's custody.[17]

The Government agrees that strong practical considerations favor judicial review of deportation orders other than by habeas corpus which requires that the alien be in custody before he can sue out a writ.[18] In the absence of a plain Congressional prohibition, not present here, an alien resident should not be refused the opportunity to litigate the legality of a deportation hearing and a deportation order until he is detained by the Government, his opponent in the litigation, with the inescapable difficulties of conducting his case from a detention cell. Bail is at best a precarious alleviation of this difficulty when it is considered that the Government argues that § 242 of the 1952 Act restricts review of the Attorney General's denial of administrative bail to the question whether the Attorney General is proceeding expeditiously, and Rule 45 of this Court provides that bail pending appeal is not allowed if the writ is refused.[19] As a practical matter habeas corpus is not a

[17] The remark of Senator McCarran on the floor of the Senate to the effect that judicial review of exclusions orders had not previously been granted (98 Cong. Rec. 5789) does not mean that the 1952 Act did not grant such review if that is the normal consequence of the language used in the statute.

[18] The Department of Justice has prepared a proposed bill on the matter. On November 13, 1952 Acting Solicitor General Robert L. Stern stated in a letter to the President's Commission on Immigration and Naturalization (Hearings Before the Commission, 82 Cong. 2nd Sess., p. 1353) that "there is general agreement that such [deportation] orders should be subject to judicial review as soon as they are administratively final" and review should not be restricted to the remedy of habeas corpus after being taken into custody. Mr. Stern's letter admitted that the requirement of custody in habeas corpus actions to test deportation orders was "inconvenient to the alien and of no corresponding benefit to the Government". Attorney General Brownell supported this view in his report to the Judicial Conference on September 24, 1953 (Brief in Opposition, p. 6).

[19] Alien seeking release on habeas corpus pending decision on the merits of their writ experience months of detention and frequently are required

complete and adequate remedy and a resident alien should not be restricted to it unless and until Congress expressly so requires. Another practical consideration is that if an alien in detention is unable to obtain bail or judicial stay of deportation pending judicial review, and the Department of Justice opposes such stays, and he is deported or leaves voluntarily while his case is pending, the habeas corpus proceeding becomes moot.[20] The alien cannot continue to litigate the legality of the deportation order even though its practical effects are not moot because he may wish to return to the United States but if deported is not permitted to apply for a visa without the Attorney General's permission (§ 212(a)(17) of the 1952 Act).

It is submitted that insofar as any practical considerations are relevant there is no such consideration warranting refusal to give effect to the intent of Congress to allow judicial review other than habeas corpus to be found in the text of the statute and its history. There are strong practical considerations for giving effect to this intent of Congress to make available judicial review not requiring the

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to appeal to Justices of this Court or the full Court before they are released. *U. S. ex rel. Accardi* v. *Shaughnessy*, (No. 366, October Term, 1953—Detained seven months before release by order of full Court); *Carlson* v. *Landon*, 342 U.S. 524 (Petitioners were detained seven months before released by order of this Court). See also: *Galvan* v. *Press*, (No. 407, October Term, 1953) and *Yamish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (May 16, 1953).

[20] Although the dissenting member of the Court of Appeals assumed that aliens would not be deported pending judicial review and that therefore injunctive relief was unnecessary, the contrary has been demonstrated. In the past year in at least two instances known to counsel herein, where injunctions were not sought, the Attorney General deported aliens notwithstanding the pendency of judicial review. *Michelino* v. *Brownell*, Civil Action No. 3596, 1953 (Dist. of Col.). On August 25, 1953, the United States Attorney advised counsel that the action was moot because Michelino had been deported. Likewise in *Vassilatos* v. *Brownell*, Civil Action No. 3493, 1953 (Dist. of Col.), the action was dismissed after the alien had been deported pending judicial review.

alien to be in governmental custody before seeking judicial review by habeas corpus.

POINT II

II. Declaratory Judgment Is Appropriate

Apart from the Administrative Procedure Act, it is submitted that declaratory judgment is available under 28 U.S.C. 2201. It is true that prior to 1934 when the Declaratory Judgment Act was enacted the courts refused declaratory judgments and injunctive relief from deportation orders. These cases are set forth in footnote 2, *Heikkila* v. *Barber, supra. Fafalios* v. *Doak*, 50 F. 2d 640 (C. A. D.C., 1931) denied a bill in equity upon the ground that the remedy at law was adequate. *Poliszek* v. *Doak*, 57 F. 2d. 430 (C.A. D.C., 1932) and *Kabadian* v. *Doak*, 65 F. 2d. 202 (C.A. D.C., 1933) denied writs of prohibition because of the availability of habeas corpus—a remedy at law. In *Darabi* v. *Northup*, 54 F. 2d. 70 (C.A. 6, 1931) the alien brought habeas corpus together with a bill in equity. The lack of merits of both actions resulted in the denial of relief. *Imperiale* v. *Perkins*, 66 F. 2d 805 (C.A. D.C., 1933) was a petition for the suppression of evidence taken from an alien prior to the institution of contemplated deportation proceedings or criminal action. The court held that the action was not maintainable and that it was premature, stating: "The jurisdiction of the courts is . . . usually to be exercised by a writ of habeas corpus ex post facto of an order of deportation." *Azzolini* v. *Watkins*, 172 F. 2d. 897 (C.A. 2, 1949) merely contains a *dictum* on the subject based upon the *Kabadian and Imperiale* cases, *supra.* The *Azzolini* case was overturned on the merits in *Sung* v. *McGrath*, 339 U. S. 33 (1949).

The foregoing decisions, rendered prior to 1934 are not persuasive or controlling under the Declaratory Judgment

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Act. In addition it should be observed that since the promulgation in 1938 of Rule 57 of the Rules of Civil Procedure (Appendix p. 72 herein), declaratory judgment may not be denied upon the basis of the existence of a remedy at law.

Under 28 U. S. C. 2201, in case of actual controversy, except with regard to Federal taxes, any court of the United States, upon filing an appropriate pleading, may declare the rights and other legal relations of any interested party.

The prerequisites for obtaining declaratory relief are: (1) a justiciable controversy; (2) A controversy between adverse parties; (3) A tangible legal interest in the controversy by the party asserting it; (4) An issue ripe for adjudication. *Duvall, Declaratory Judgment Actions: Present-Day Uses of a Tested Procedure* [34 American Bar Association Journal (1938) 379].

All four factors noted above exist in the instant case. In a similar situation, declaratory judgment has been deemed appropriate. In *Perkins* v. *Elg* (District of Columbia, Equity 63, 408) Judge Bailey held:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States, and in case of her not doing, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (Italics supplied).

The Court of Appeals for the District of Columbia on review said (99 F. 2d. 408):

> "Appellants, Secretary of Labor and Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her (plaintiff's) arrest and deportation. * * * She has not yet been arrested and there-

> fore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights—certainly no less than property rights—and an actual and vital controversy exists between her and the government in relation to them. *The right to be immune from threats of deportation* and from the declarations of public officials that she is an alien and subject to arrest, *is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit.*

Upon review by the Supreme Court (307 U.S. 325) it was ruled that:

> "The court below, properly recognized the existence of an actual controversy with the defendants (Aetna *Life Ins. Co.* v. *Haworth*, 300 U.S. 227) * * * and we think the decree should include the Secretary of State as well as the other defendants."

The issue in this case is one of deportability rather than citizenship. The "construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common question of declaratory action." *Borchard, Declaratory Judgments* (2nd ed., 1941) pp. 788-789. There can be no dispute that the issues here presented fall into this category of cases and it is immaterial whether the issues be concerned with citizenship or deportability.

A. A Justiciable Controversy Is Presented by a Proper Party

There is no dispute as to the existence herein of a controversy between adverse parties, nor that respondent can properly test the validity of the deportation order herein. The issues of law raised by the complaint are justiciable.

Justiciability can hardly be made dependent upon the fact that declaratory judgment is sought here rather than

habeas corpus. The issues herein are issues of law, issues which have always been cognizable judicially under Article III of the Constitution.

B. The Issue Is Ripe for Judicial Adjudication

When the Attorney General directed respondent's deportation on December 29, 1952, the administrative adjudicatory process came to an end. The case then became appropriate for judicial review to determine whether a valid order of deportation had been entered. The opposing parties herein are in disagreement on this issue.

> "The actuality of the plaintiffs' need for a declaration of his rights is therefore of decisive importance." *Eccles* v. *Peoples Bank*, 333 U. S. 426 (1948).

That there is a need for a declaration of respondent's rights herein is clear. Declaratory judgment will permit an adjudication of the legal relationships herein without requiring expense to the government and inconvenience to the alien which is attendant where he is detained pursuant to an order of deportation. Unlike habeas corpus which requires adjudication after an alien is detained, declaratory judgment will permit an adjudication prior to detention. If habeas corpus is the exclusive remedy herein, then there is no way in which an alien can secure a judicial determination of his status without surrendering himself to the inconvenience and expense of detention while litigation is instituted and his rights determined.

> "Declaratory judgment procedure * * * may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action." *House Committee Report* 1946, p. 42; Senate Document 248, 79th Congress, p. 276.

See also: *Final Report of the Attorney General's Committee on Administrative Procedure*, Senate Document 8, 77th Congress, 1st Session at p. 81.

"The distinctive characteristic of the declaratory judgment is that it adjudicates the legal issues between the parties, without providing for the coercive action of execution or performance." *Duvall, supra.*

This is the very purpose of declaratory judgment which will be served herein.

Point III

Heikkila v. Barber Should Not Be Extended to Preclude Review Herein

For the reasons set forth in petitioner's brief in *Shung* v. *Brownell*, (No. 241, October, 1953 Term, pp. 7-22) we entertain serious doubts as to the soundness of *Heikkila* v. *Barber*, 345 U. S. 229. Its application should therefore be strictly limited to proceedings instituted prior to December 24, 1952 if its doctrine is to be followed.

1. *Heikkila* v. *Barber* erroneously assumes that *Lem Moon Sing* v. *United States*, 158 U. S. 538 (1895) and *Fok Young Yo* v. *United States*, 185 U. S. 296 (1902) are still controlling. These cases decided under the Chinese exclusion statutes denied judicial review of issues of law, even in habeas corpus proceedings. Significantly the statute then specifically recognized habeas corpus review. (27 Stat. 25; 8 U. S. C. 286). These Chinese exclusion cases were qualified by *Geigow* v. *Uhl*, 239 U. S. 3 (1915) which held that the finality provisions of the general immigration statute only referred to conclusiveness upon issues of fact.

2. The *Heikkila* case erroneously assumes that judicial review in immigration cases is limited to review required by the Constitution (345 U. S. 234-5). In *Geigow* v. *Uhl*,

supra; Johnson v. *Shaughnessy,* 336 U. S. 806 (1949); and *McGrath* v. *Kristensen,* 340 U. S. 162 (1950) [21] judicial review in immigration cases was permitted although not required by the Constitution.

3. The *Heikkila* case erroneously concludes that declaratory judgment is unavailable in deportation cases. Point II, *supra,* reviews the proper application of the Declaratory Judgment Act herein.

4. The fourth error of the *Heikkila* case is the assumption that habeas corpus is the exclusive remedy (345 U. S. 237). Where Congress had habeas corpus in mind, it specifically referred to that remedy as in the 1892 Chinese Exclusion Act (27 Stat. 25; 8 U. S. C. 286) and in the 1952 Immigration Act for certain purposes (8 U. S. C. 1503). Congress has never said that the validity of deportation orders can be tested only in habeas corpus proceedings.

5. Finally, the *Heikkila* case erroneously holds that the 1917 immigration statute is one which precludes judicial review. Ever since the *Geigow* case, the finality of immigration decisions has not precluded judicial review to determine whether the administrative action contravened the Constitution, the statute, or whether it was reached without a fair hearing or supporting evidence. *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329 (1932).

Judicial review of cases governed by a statutory declaration of finality is not limited to habeas corpus. De-

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[21] In the *Heikkila* opinion this Court comments that Kristensen litigated an erroneous determination of "status" in respect of eligibility for citizenship. But in that case the question of *Kristensen's* eligibility for citizenship arose in a deportation proceeding under Sec. 19 of the 1917 Act (8 U.S.C. 155-e-2) which provided that any alien who is deportable might receive voluntary departure in lieu of deportation or suspension of deportation if not ineligible to naturalization. Under the statute *Kristensen* had to be deportable to be eligible for suspension of deportation and his status as an alien, even a deportable alien, was not disputed and the relief he sought was against a final order either of voluntary departure or of deportation.

pending upon the nature of the case, and the available judicial techniques, review may otherwise be had, *e.g., Lloyd Sabaudo Societa Anonima* v. *Elting, supra* (review in an immigration case by suit to recover fines); *Perkins* v. *Elg, supra,* and *McGrath* v. *Kristensen, supra* (review in deportation cases by declaratory judgment actions); *Estep* v. *United States,* 327 U. S. 114 (1946) (review in selective service case by defense of improper classification asserted in a criminal trial).

Mr. Justice Holmes in the *Geigow* case, involving an excluded alien, declared that finality under our immigration statutes meant "conclusiveness upon matters of fact" only. Thus it is clear that the finality involved in immigration decisions under the 1917 Immigration Act is effectuated when judicial review is restricted to the *type of issues* historically deemed proper for the court—*matters of law,* to use a shorthand expression. Such *finality* is not concerned with the method of obtaining review, since obviously review in declaratory judgment actions can be as strictly limited in scope as review in habeas corpus—to naked questions of law. The Government's finality argument restricting review to habeas corpus was rejected in the *Kristensen* case, and it was decided that a cause ripe for declaratory judgment had been established. *McGrath* v. *Kristensen, Perkins* v. *Elg, Geigow* v. *Uhl,* can not remain as controlling law at the same time with *Heikkila* v. *Barber.* If finality of immigration decisions preclude judicial review, it matters not whether review be in habeas corpus or declaratory judgment and it matters not whether the issue be one of eligibility to citizenship or deportability.

Thus is thrown in bold relief the error of the *Heikkila* case. From any legitimate viewpoint of administrative finality, it matters not one whit whether a narrow issue of law be reviewed by habeas corpus or by the more civilized

method of a declaratory judgment action. The latter permits adjudication of an issue of law by an alien without the necessity of arrest, confinement and severance from his family, friends and employment.

Point IV

The Court of Appeals Properly Directed the Issuance of a Preliminary Injunction

If declaratory judgment or review under the Administrative Procedure Act is maintainable, as we contend, then injunctive relief was appropriate as directed below. The Government contends that injunctive relief was improper because (1) it was threatening to enforce the order of deportation by mere apprehension of respondent and had not yet made up its mind to detain him; (2) Section 242(c) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252-c) grants petitioner unlimited and unreviewable discretion to detain; (3) the threat of detention under Section 242(c) can only be defeated by an allegation and proof that the Attorney General is not proceeding with due diligence; and (4) that the Court of Appeals erroneously concluded that issues were presented which were required to be heard. W submit that the Government's position is not supported either by the record herein or the applicable law.

The Court below correctly held that the question of the legality of the respondent's proposed detention by the Attorney General is governed by the principles of *Carlson* v. *Landon*, 342 U. S. 524 (1952), and that on the *facts of this record* his arrest and detention would be a clear abuse of discretion and should be enjoined (R. 24).

The Government contends (Br. 41-54) that §242(c) of the 1952 Act was intended to limit the *Carlson* doctrine and make a refusal of bail reviewable, even in habeas corpus, only upon a conclusive showing that the Attorney General is not proceeding with reasonable dispatch to effect

the alien's deportation. At the conclusion of this argument (Br. 52) the Government recognizes that it proves too much because it requires a conclusive showing of the practically impossible, namely, that the Attorney General is not proceeding to deport an alien during the period of judicial review to prevent the deportation. The respondent contends (A) that the statute plainly does not have such an impossible meaning; (B) that the Fifth Amendment requires that respondent be relieved from detention, (C) that detention for deportation without a place of deportation named in the warrant or order of deportation is unlawful, (D) that this action has merit, and (E) that judicial discretion was properly exercised in granting the preliminary injunction.

At the outset it warrants emphasis that there are two factual obstacles to the Government's position. In the first place the Government has not contested the facts upon which the Court below granted the preliminary injunction, including the Government's admission in the Court below that "no injury to the public interest is to be anticipated from postponing appellant's arrest" (R. 14).

A second factual obstacle to the Government's position is that there is not available to the Government at this time its argument that the Attorney General has not yet exercised his discretion to detain or release respondent pending judicial review and that the exercise of this discretion should not be enjoined. On this record the question presented is whether the Attorney General, having determined to detain the respondent pending judicial review in an effort to deport him, may be enjoined from doing so *pendente lite* in the circumstances presented. The Government failed completely to deny the allegations in support of the preliminary injunction that if defendant below is not enjoined the plaintiff below "will be taken into custody and deprived of his liberty until such time as the proceeding has been determined" and that "in all similar cases, the

defendant has authorized the continuation of bail for persons similarly situated during judicial review, and defendant's denial of the continuation of bail herein constitutes an abuse of discretion" (R. 5). Originally in the District Court the Government apparently was content to accept the truth of these allegations, or to treat them as immaterial, and to rely on its legal argument that only in habeas corpus may respondent seek judicial review. The Government supports respondent's contention that he would be detained pending judicial review and during the period attempts might be made to deport him by the statement in their brief (p. 42) that on December 30, 1952, the surety company on the respondent's bond was directed to surrender him "for deportation".[22]

If respondent had been relegated to detention and habeas corpus these allegations might have become immaterial because respondent's continued detention would have established the Attorney General's determination which respondent here alleges has already been made. In any event, at this time and on this record the Government has not denied the allegations on which the preliminary injunction has been granted and is restricted to arguments available on the facts, as alleged, that the Attorney General

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[22] The Attorney General confirmed this when he publicly announced his decision to detain Rubinstein in the Department of Justice Press Release of December 29, 1952 which stated in part:

> "Attorney General James P. McGranery today ordered Serge M. Rubinstein, Russian-born financier residing in New York City, *taken into custody for deportation.*"
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> • • • • • • •
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> "Rubinstein will be given until 10 A. M. tomorrow to surrender in the New York office of the Immigration and Naturalization Service. *He will be sent to Ellis Island pending arrangements for his deportation from the country.*"

has determined to detain respondent pending judicial review.[23]

The threat to *detain* Rubinstein conforms, not to the pious hope of Government counsel herein that immigration officials intend to exercise a reasonable discretion over the respondent, but rather to the arbitrary prejudgment of detention by the Department of Justice. After the institution of this litigation, a letter of the Assistant Commissioner of Immigration, dated October 4, 1952 became public (*Hearings before the President's Commission on Immigration and Naturalization*, 82d Congress, 2d Session, pp. 1953-4). He advised the President's Commission as follows:

> "* * * we believe that the Government should avail itself to the fullest extent of the detention provisions of section 23 of the Internal Security Act and, when it becomes effective, to section 242 of Public Law 414, *not only as to those aliens in whose cases the Service cannot procure travel documents* but in the cases of all aliens who are in the United States illegally who are not eligible for any form of discretionary relief, and who refuse to depart from the United States, continuously, of course, bearing in mind that there will al-

[23] If the Government merely intended to reconsider the amount of the bond or terms of parole there was no reason to depart from the usual practice of inviting the alien ordered deported to appear at an immigration office for an interview. The unusual practice of an immediate demand on the surety to surrender the alien for deportation indicates that a decision had been made to hold the alien for deportation. A partial listing of some of the deportation cases in which the usual practice was followed in the District of Columbia and detention and deportation were stayed pending judicial review without requiring the alien to surrender into custody includes *Lewin* v. *McGrath* (C.A. No. 10,338); *Sardo* v. *McGrath* (C.A. No. 10,363); *Tack* v. *McGrath* (C.A. No. 10,379); *Machado* v. *McGrath* (C.A. No. 10,445); *Rasmussen* v. *McGrath* (C.A. No. 10,514); *Guggenheim* v. *Miller* (C.A. No. 10,323); *Wing* v. *McGrath* (C.A. No. 10,509); *Teng* v. *McGrath* (C.A. No. 10,510); *Foo* v. *McGrath* (C.A. No. 10,511); *Swarez* v.*McGrath* (C.A. No. 10,512); *Yuen* v. *McGrath* (C.A. No. 10,513).

ways be cases requiring special action because of humanitarian or other considerations."

It thus becomes clear, that Rubinstein, was to be detained without bond, in view of the fact that he was a stateless alien, for whom the Immigration Service could not procure travel documents to effectuate deportation.

A. The Statutory Power to Detain

The authority of a Government official to arrest and detain any person residing in the United States, alien or citizen, must be found in some valid statute. Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) provided that aliens believed to be deportable "shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * * ". Section 20 (8 U.S.C. 156) originally provided that pending the final disposal of the case of any alien so take into custody he might be released under a bond of not less than $500 conditioned that he should be produced when required for a hearing and for deportation.[24] Section 23 of the Internal Security Act of 1950 (64 Stat. 987) amended § 20 of the 1917 Act to provide, in somewhat similar language to that now found in the 1952 Act, that pending final determination of deportability and also for a period of six months after an order of deportation the Attorney General in his discretion may continue the alien in custody, release him under bond, or on conditional parole. No express provision for judicial review of the Attorney General's bail determinations under this section was provided but it was held that the denial of bail during the administrative proceeding could be judicially reviewed and that on the facts of particular cases the re-

[24] Subsequent deportation statutes provided that aliens be taken into custody and deported in the manner provided in the 1917 Act (8 U.S.C. 137, 157, 214).

fusal of bail was not a denial of due process of law under the Fifth Amendment. *Carlson* v. *Landon, supra.*

Section 242(a) of the 1952 Act authorizes the alien's arrest and custody, or release on bond or conditional parole, "until final determination of his deportability". A limited court review is expressly provided upon a conclusive showing in habeas corpus that the Attorney General is not proceeding with reasonable dispatch to determine deportability. These statutory provisions govern control over the alien during the period of administrative proceeding to determine deportation between the issuance of the warrant of arrest and the order and warrant of deportation.

Section 242(c) governs control of the alien during the period of six months from the date of the final order of deportation "under administrative processes" or, if judicial review is had, from the date of the final order of the court.[25] During this six months period, at the Attorney General's discretion, the alien may be detained or released on bond or on conditional parole. The limited judicial review provided in § 242(a) is repeated in § 242(c).

Subsection (d) of § 242 authorizes regulations for the supervision of aliens against whom final orders of deportation have been outstanding for more than six months. Subsection (e) contains a provision for further control of certain classes of aliens ordered deported by making it a felony for any such alien wilfully to fail or refuse to make timely application in good faith for travel or other documents necessary for departure. *United States* v. *Spector*, 343 U.S. 169 (1952).

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[25] The explicit language of § 242(c) cured the ambiguity of § 23 of the Internal Security Act of 1950, which did not make it entirely clear whether this six months period began with the final administrative order or with the final court order if judicial review were had.

Section 242 read as a whole discloses the complete and detailed statutory scheme authorizing detention of an alien during the administrative process and during the period of six months after a fina' court order reviewing a deportation order and authorizing supervision other than detention and prosecution in certain cases after this six months period. The complete absence of any authorization of detention during the period of judicial review was not inadvertent but a deliberate recognition that there can be no deportation during judicial review and that therefore there is no reason to provide authority to detain for deportation during judicial review. The purpose of authorizing detention, or bond or parole in lieu thereof, in § 242(a) is to insure that the alien shall be produced for a hearing and eventually for deportation. Section 242(c) authorizes detention, or a bond or parole in lieu of detention, during the six months period after judicial review of the deportation order in order to have the alien available to effect his departure from the United States. Sections 242(d) and (e) have similar purposes. But since deportation during judicial review was not contemplated by Congress there was no reason to authorize detention during judicial review in order to effect deportation and therefore Congress deliberately omitted any authorization to detain an alien for deportation during judicial review.

The Court below thought that Congress did not mean to withhold authority to arrest an alien no matter what the circumstances during the period of judicial review and in order to fill the gap construed § 242(a) as applicable during this period (R. 23). The Government argues that if respondent was in custody he would be relegated to habeas corpus and since under the provisions of §§ 242(a) and (c) review would be limited to reasonable dispatch therefore

during the period not covered by these subsections review should be similarly limited and respondent should be relegated to this patently inadequate remedy. Respondent submits that because Congress provided a limited examination of detention for the periods before and after judicial review it cannot be concluded that Congress intended to restrict judicial examination of detention in the same manner during the period of judicial review. In the absence of a clear expression of the intent of Congress to this effect it is more reasonable to conclude that Congress intended to do what it did, namely, during the period of judicial review to leave the matter of detention entirely to the courts.

B. Detention of Respondent, Concededly Not a Security Risk, Pending Judicial Review, Would Violate His Constitutional Rights Under the Fifth Amendment

The record supports the conclusion that petitioner is threatening to apprehend and detain Rubinstein. The Attorney General has offered no reason for his insistence that Rubinstein be detained on the warrent of deportation "for deportation" pending judicial review. The Attorney General's concessions below that Rubinstein is not a security risk, and that the warrant of deportation does not name a place of deportation, and that no place of deportation has been determined, and that it is not intended to attempt to deport him during judicial review, make it clear that the Government has no reason for Rubinstein's detention which can bear judicial scrutiny. The Attorney General has not on this record, answered the complaint or filed any affidavit in opposition to the motion for preliminary injunction, or in any way presented any facts in support of his naked assertion of absolute power to detain Rubinstein without giving any reason during the period of judicial review.

The courts, however, have authoritatively determined that there is a constitutional basis for review of the Attorney General's denial of, or revocation of, administrative bail. The Government has not heretofore urged in the Supreme Court that the Attorney General's discretion is not subject to judicial review. *Carlson* v. *Landon, supra,* at page 540. The courts have pronounced the Attorney General's action to be arbitrary and have ordered that bail be granted unless the Attorney General shows facts by affidavit disclosing the most compelling reasons for such deprivation of personal liberty pending determination of a civil deportation proceeding. *Carlson* v. *Landon, supra; U. S. ex rel. Heikkinen* v. *Gordon,* 190 F. 2d 16 (C. A. 9, 1951); *U. S. ex rel. Pirinsky* v. *Shaughnessy,* 177 F. 2d 708 (C. A. 2, 1949); *U. S. ex rel. Potash* v. *Shaughnessy,* 169 F. 2d 747 (C. A. 2, 1948); *U. S. ex rel. Klig* v. *Shaughnessy,* 94 F. Supp. 157 (S.D.N.Y., 1950).

In the *Carlson* case, *supra,* the aliens were granted bail of five thousand dollars each by the Supreme Court pending appeal (190 F. 2d at p. 21) even though the evidence offered by the Government supported a final determination that the Attorney General had established sufficient facts of subversive leadership activities to warrant revocation of bail. *A fortiori,* Rubinstein here should be at large on his present bail of one thousand dollars pending judicial determination where there is not even a claim of subversive activities and no offer by the Government of any facts warranting detention. The opinion of the Court in the *Carlson* case (342 U.S. at p. 542) makes it clear that it is denial of due process under the Fifth Amendment to refuse bail in the absence of a reasonable apprehension by the Government that the alien at large will be a security risk or not appear for hearings or deportation when required. The separate dissenting opinions of Mr. Justice

Black, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Burton serve to emphasize the application of the Fifth Amendment.

In the *Pirinsky* and *Klig* cases, *supra*, where some contention could be made that public safety was involved, the courts pronounced revocation of bail arbitrary and required that the aliens be continued on bail.

In the instant case, it is asserted (R. 5) and not denied, that the Attorney General has refused to continue Rubinstein's bail, although the practice has been otherwise in similarly situated cases. Throughout the case, as disclosed by the record, the Attorney General has asserted the intention to detain Rubinstein "for deportation."

This, then, is not a case where the Attorney General intends to exercise discretion if he should be permitted to secure custody of Rubinstein. Upon this record, it is established that he has already made a determination not to release him on bail when apprehended. Were the situation otherwise, the Government would not be making the extreme contention in the courts below and in this Court that under 242(c) of the 1952 Immigration and Nationality Act even during the period of judicial review he has absolute power to detain an alien subject only to limited examination on habeas corpus. The Government asserts that during the period of judicial review, when deportation will not be effectuated, it has arbitrary and despotic power to detain under Section 242(c), subject to review only in habeas corpus upon a show of lack of "reasonable dispatch" on the part of the Attorney General. Obviously, during this period the Attorney General is not required or authorized to effectuate deportation or any other action with "reasonable dispatch." Detention without cause for six months with a limited ineffectual right of habeas corpus

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unlawfully and unconstitutionally suspends the operation of that great writ.

Stated in simplest form, the position of the Government (Brief p. 51) is that an alien cannot litigate the validity of a deportation order until he has completed six months of confinement at Ellis Island. If the Attorney General does not take him into custody he would never have an opportunity to test the validity of a deportation order according to this theory. Even though the Attorney General is acting wrongfully, the Government would not permit an attack upon the validity of the deportation order during the first six months of custody. During that period, it is claimed, the only permissible attack is whether the Attorney General is proceeding with dispatch to carry out a deportation which may have no warrant in law at all.

The claim of such arbitrary powers by the Government under Section 242(c) is not only contrary to the constitutional principles enunciated in *Carlson* v. *Landon*, 342 U. S. 524, but has been specifically rejected in every case in which it has been asserted under the 1952 Immigration and Nationality Act. *U. S. ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109 (C.A. 2, 1953); *U. S. ex rel. Nukk* v. *District Director*, 205 F. 2d 242 (C. A. 2, 1953); *Yanish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (May 16, 1953) and *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A.D.C., 1953). This unusual claim of arbitrary powers, so at variance with our constitutional and democratic concepts, is unworthy of acceptance.

In *U. S. ex rel. Yaris* v. *Esperdy*, *supra*, the court rejected the Government's contention that Section 242(a) [containing the same language as Section 242(c)] limited judicial review of the legality of detention in the following language:

> "In the absence of clear language to the contrary, we cannot construe the statute to give the Attorney

> General unbridled license to exercise his discretion as to detention in whatever arbitrary or capricious way he might see fit, provided only that he act with reasonable dispatch to obtain a decision as to the alien's deportability. On the contrary, we think his discretion as to keeping an alien in custody is judicially reviewable to the same extent it was before. Section 242 provides but an added statutory recognition of a basis for judicial review, not a limitation upon the power as it had existed."

In *Developments in the Law, Immigration and Nationality*, 66 *Harvard Law Review* 643, 700 (March, 1953) it is stated concerning these statutory limitations on judicial review:

> "Moreover, it may be interpreted as denying a court the power to release on other grounds, such as initial arbitrariness in ordering confinement. So construed this provision might be held a denial of due process."

It should also be noted that Rubinstein was ordered to surrender for deportation and this without any adequate notice or hearing on revocation of bail. Even a convict may not have his parole revoked without notice and substantial evidence justifying such action. He is entitled to fair treatment and to be protected from official whim or caprice. *Burns* v. *United States*, 287 U. S. 216, 223 (1932); *Compagna* v. *Hiatt*, 100 F. Supp. 74, 80 (N. D. Ga., 1951). See also 65 *Harvard Law Review*, 309. *A fortiori* an alien in a civil deportation proceeding is entitled to notice and hearing on revocation of bail.

It is submitted that under the authorities cited it is entirely clear that the threatened detention of Rubinstein "for deportation" is capricious, oppressive and punitive and a denial of due process of law guaranteed to him by the Fifth Amendment to the Constitution.

C. Apprehension or Detention for Deportation Prior to Ascertainment of a Place of Deportation Named in the Order or Warrant of Deportation Is Unlawful

The respondent is a stateless person who does not have the right to enter any foreign country and is in the position of many stateless former Russian subjects in the United States who fled the communist regime and are at large under deportation orders because there is no country to which they can be deported. Senate Report No. 1515, *supra*, states (p. 637): "that there are 3,600 nonenforcible deportation orders, of which 1,365 involve Russians". Government counsel conceded in the Court below that the warrant of deportation under which it is sought to arrest and detain respondent does not name a place of deportation and that no place of deportation has been determined. The form of warrant of deportation which is in use contains a blank space into which is to be inserted the foreign place of deportation. This warrant, which is the authority for the arrest and detention of the alien, commands an officer of the Service to deport the alien to the designated place.[26]

Aliens charged with being subject to deportation may be detained only as an incident to actual deportation and must be released if they cannot be deported. *Wong Wing* v. *United States*, 163 U. S. 228, 235; *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C.A. 9, 1931) *Wolck* v. *Weedin*, 58 F. 2d 928 (C.A. 9, 1932); *Ex Parte Matthews*, 277 Fed. 857 (W.D. Wash., 1921); *U. S. ex rel. Chumura* v. *Smith*, 29 F. 2d 287 (W.D. N.Y. 1927). A warrant of deportation which does not indicate the place of deportation is null and void. *Ex Parte Callow*, 240 Fed. 212 (D. Colo. 1916); *Ex Parte Yabucanin*, 199 Fed. 365 (D. Mont. 1912).

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[26] A copy of the form of warrant is contained as Appendix A (p. 72) of the Government's Brief in *Martinez* v. *Neely*, No. 218, October Term, 1952.

In *Ex Parte Callow, supra,* the Court stated:

> "The warrant of deportation directs that the petitioner be returned 'to the country whence he came' . . . He is not without right simply because he is subject to deportation. He cannot be simply sent away. He has a right under the Act to be returned to the country from which he came, and to be protected in that right, the warrant which authorizes the deportation should expressly name the country to which he is to be taken; and that right should not be left to the determination of the officer executing the warrant or to the transportation company which brought him in as their judgment or convenience might dictate."

In *Ex Parte Yabucanin, supra,* the Court stated:

> "It would seem, however, that the warrant of deportation is defective, in that it does not name the country from whence petitioner came and to which he is entitled to be deported. *For this reason, it is uncertain and authorizes deportation nowhere. It must contain specific directions for the protection of the party to be deported and for the information of the deporting authorities and agencies."* (Emphasis supplied.)

In the past the Board of Immigration Appeals has designated the place of deportation in deportation orders. *Vol. III, I. & N. DEC.*, 5; *Vol. II, supra,* 92, 733, 889; *Vol. I, supra,* 20, 137, 143, 209, 290, 343, 352, 403, 422, 485, 490. The 1946 Immigration Manual of the Department of Justice (p. 7101) states that the warrant of deportation must "state the place to which the alien is to be deported." See also: 32 Virginia Law Review 1142.

Designation of the proper place of deportation has always been considered important. *Bellaskus* v. *Crossman,* 164 F. 2d 412 (C. A. 5, 1947), reversed without opinion solely for failure to determine correct place of deportation, 335

U. S. 840 (1948); *Thack* v. *Zurbrick*, 51 F. 2d 634 (C.A. 6, 1931); *U. S. ex rel. Chow Yee Tung* v. *Harrison*, 143 F. 2d 128 (C.A. 2, 1944); *Gorcevich* v. *Zurbrick*, 48 F. 2d 1054 (C.A. 6, 1931); *Wenglinsky* v. *Zurbrick*, 38 F. 2d 985 (C.A. 6, 1935), reversed without opinion with direction that habeas corpus be sustained, 282 U. S. 798 (1930); *U. S. ex rel. Ng Hen* v. *Sisson*, 220 Fed. 538 (S.D. N.Y., 1914).

Section 243(a) of the 1952 Act expressly provides that deportation shall be directed "to a country promptly designated by the alien" if willing to accept him and not prejudicial to public interest. The failure to comply with this statutory requirement renders the warrant void and baseless as authority for the arrest and detention of respondent. *U. S. ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347 (C.A. 2, 1950); *U. S. ex rel. Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C.A. 2, 1951).

It is submitted that quite apart from petitioner's lack of statutory authority to detain respondent for deportation pending judicial review and the capricious character of revocation of bail in the absence of security considerations the attempt to detain respondent for deportation in the absence of a determination of a place of deportation is invalid and unconstitutional and should be enjoined.

D. Merits of This Action

Judge Proctor dissented below on the ground that a preliminary injunction should be denied because in his view the conviction for which respondent has been ordered deported involves moral turpitude, and the other asserted grounds for the invalidity of the deportation hearing and the deportation order are not substantial (R. 25-27). The Court below held that the question of detention "is entirely independent of the question who is likely finally to prevail in regard to the validity of the deportation order"

(R. 24). The respondent submits that the Court below was clearly correct in deciding that the constitutional question of the adequacy of the basis for detaining respondent pending judicial review is entirely separate from the questions of the validity of the deportation proceeding and the deportation order. *Carlson* v. *Landon, supra.* The rule that a preliminary injunction should not be granted to a party not likely to succeed on the merits is applicable in property matters and where money damages are recoverable, but is entirely inappropriate where the irreparable damage of imprisonment and loss of personal liberty is involved. Moreover, it is demonstrable that this action does possess merit on several grounds in addition to the ground discussed above that the warrant of deportation is incomplete and invalid.

1. *Unfair hearing.* The complaint alleges that in concluding to deport respondent matters outside the record of the hearing available to respondent and his counsel were considered, including confidential information, communications urging respondent's deportation, and unfavorable newspaper publicity (R. 2-3). The complaint also alleges that the hearing officer who presided at the first hearing recommended that the proceedings be terminated upon the ground that the crime for which respondent was convicted did not involve moral turpitude, but a rehearing was conducted by an officer subject to the control of officials engaged in prosecuting and investigatory functions and that it was this second hearing which resulted in a recommendation of deportation (R. 2). Apart from the validity of the ground of deportation the respondent is entitled to a fair hearing. *Sung* v. *McGrath,* 339 U. S. 33, 50 (1950). Consideration of matters outside the record renders the hearing unfair. *Kwock Jan Fat* v. *White,* 253 U. S. 455 (1920); *Alexiou* v. *McGrath,* 101 F. Supp. 421 (Dist. of Col., 1951).

2. *The crime within five years of entry did not involve moral turpitude.* The complaint alleges that the respondent was admitted for permanent residence on April 3, 1938 and has resided here continuously since that time and has taken one short roundtrip Caribbean cruise from and returning to New York City in April 1939 (R. 1). The fourth and fifth counts of the five count indictment allege conduct on or about October 12, 1943 and thereafter and not within the five year period (166 F. (2d) 249, 251) if the last entry for purposes of computation of the five year period was the 1938 entry, as respondent contended in the administrative proceeding, and not the date of the return to New York City in the course of the Caribbean cruise. The conviction on the first count was reversed (166 F. 2d 257) and not considered as a basis for deportation. The remaining second and third counts charge that just within five years after April 3, 1938 respondent, on February 2, 1943, filed with his local draft board an affidavit signed not by himself but by another officer of companies with which respondent was connected stating the opinion of the other officer that the successful continuance of the operations of the companies depended upon respondent remaining with them, and that it would be impossible to replace him without seriously impairing the drilling program and otherwise seriously hampering the activities of those companies (166 F. 2d 251). In determining that these expressions of opinion concerning future events could be false statements sufficient to support an indictment the Court of Appeals noted, but refused to follow, conflicting decisions concerning the criminal falsity of mere expressions of opinion of future events. *Chaplin* v. *United States*, 157 F. 2d 697 (C.A. D.C., 1946). Where Courts disagree as to whether the affidavit of another person which respondent filed can constitute a crime certainly there is a substantial question whether such a

crime so shocks the conscience of mankind that it can be considered to involve moral turpitude.

Respondent was convicted under Section 11 of the Selective Service and Training Act of 1940 (50 App. U.S.C. 311) for attempting to evade the draft through a claim of occupational deferment. The local draft board rejected the application and no deferment was obtained.

(a.) The Court of Appeals properly refused to pass upon the issue of moral turpitude. In the first place, there are other legal issues presented by this litigation and the case should not be decided piecemeal as the Court below ruled. More important, however, is the fact that a determination of moral turpitude has always required examination of the alien's record of conviction. *U. S. ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757 (C.A. 2, 1933); *U. S. ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (C.A. 2, 1931); *U. S. ex rel. Mylius* v. *Uhl*, 203 Fed. 152 (S.D. N.Y., 1913), affirmed 210 Fed. 860 (C.A. 2, 1914). Neither the record of conviction nor Rubinstein's immigration file were before the courts below. In its present posture, the case is not yet ripe for adjudication of the moral turpitude issue.

(b.) If the statutory provisions alone of the criminal law (Appendix herein p. 75) violated by Rubinstein constitute the sole basis for a determination of moral turpitude, then it is clear that the crime does not involve moral turpitude. (We believe that when the conviction becomes a part of the present record the same conclusion should be reached.) All crimes do not involve moral turpitude. It is in the depraved criminal intent of the law violator that moral turpitude inheres. *U. S. ex rel Meyer* v. *Day*, 54 F. 2d 336 (C.A. 2, 1931); *U. S. ex rel. Shladzien* v. *Warden*, 45 F. 2d 204 (E.D. Pa., 1930); *U. S. ex rel. Mongiovi* v. *Karnuth*, 30 F. 2d 825 (W.D. N.Y., 1929); *Wasserman, Crimes Involving Moral Turpitude*, March, 1944 Monthly Review, Immigration and Naturalization Service, p. 5.

Rubinstein was a neutral alien who, under accepted principles of international law, could not be required to serve in our armed forces. 4 *Moore International Law Digest* 52; III *Hackworth, Digest of International Law* 603. Upon determination of the respondent's first deportation hearing the Immigration hearing officer concluded that the crime did not involve moral turpitude and stated:

> "I am in doubt that an alien has the same moral obligation to defend the United States against its enemies that a citizen has. The Selective Service Act makes it a crime if he evades in violation of its Section 11. My doubt is greater as to there being a moral obligation on a neutral alien to render such military service. On the contrary, I can imagine several situations in which there would be definite moral obligation on a neutral to remain neutral (for instance, if the neutral were dealing with or connected with the International Red Cross) . . . the respondent seems to have been the victim of bad legal guidance, because if he had done in the first place what he finally did, in filing Form D. S. S. 301, he would have received the exemption as a neutral . . ."

In another case the Immigration Service adopted the same view in *Matter of M.* (File No. 56133/115) when it said:

> "The essence of the alien's crime was his attempt to avoid military service. As a citizen of this country, which he then was, such conduct was reprehensible and deserving of severe punishment. However, when the motives that impel persons to a like course of action are considered, such as religious scruples, cowardice, an innate feeling that they cannot fight against their fatherland, it is difficult to find that such a crime can be described as 'an act of baseness, vileness, or depravity in the private and social duties to his fellow men or to society', one of the commonly accepted definitions of moral turpitude. (See *United States ex rel. Hylius* v. *Uhl*, 203 F. 152, affirmed 210 F. 860)."

The Board of Immigration Appeals on July 21, 1952 in *Interim Decision No. 377, Matter of S . . . . B . . . .* (A 5496423) held that desertion in time of war, a crime punishable by death, did not involve moral turpitude.
The Board declared:

> "Although the death penalty may be imposed as a punishment for the offense, the determinative factor in the imposition of the penalty is the urgency of the situation at the time of the commission of the offense, and not any heinousness inherent in the act itself. We cannot say that the elements of the offense are such that the commission thereof would be commonly regarded as a manifestation of personal depravity or baseness on the part of respondent."

In its opinion in Rubinstein's case, dated December 4, 1952, the Board demonstrated the confusion in the administrative decisions on whether draft evasion involved moral turpitude. The Board overruled its prior decision in *Matter of Galindo,* A-6459196 (unreported) holding that draft evasion did not involve moral turpitude. The Board stated "we believe that draft evasion involved moral turpitude and the contrary holding in the Galindo case is hereby overruled." To reach a determination that this respondent was deportable the Board thus found it necessary to overrule its own decision reaching a different result in the case of another alien.

Thereafter, on August 14, 1953, the Board of Immigration Appeals, again ruled that draft evasion did not involve moral turpitude. *Vasyl Sereda,* Immigration File E. 13567) was a conscientious objector. He was convicted in that he "knowingly failed and refused to report for induction into the military service of the United States."
The Board held:

> " 'All crimes violate some laws; all deliberate crimes involve the intent to do so. Congress could not have

meant to make the willfulness of the act a test; it added as a condition that it must be shamefully immoral' *United States* v. *Day*, 34 F. 2d 920, C.A. 2). It is not the conduct of the individual in question, but the *crime defined by law* that determines whether a conviction involves moral turpitude (*United States ex rel Mylius* v. *Uhl*, 203 Fed. 152, D.C. N.Y. affirmed 210 Fed 680, C.A. 2; *United States ex rel Zaffareno* v. *Corsi*, 63 F. 2d 757, C.A. 2). * * *

To determine if the crime defined involves moral turpitude, we are required to consider what elements must be proven to show guilt (*United States ex rel Mylius* v. *Uhl*, supra.). A review of decisions reveals that to establish a violation, there need be shown (1) there was actual knowledge of the existence of an obligation imposed by law, and (2) a deliberate refusal to comply with that obligation. Malignity of purpose, depravity of disposition or fraud need not be shown. The presence of motivation based on good faith and high principles are all immaterial to the issue raised by the law. (See *United States* v. *Kime*, 188 F. 2d 677, C.A. 7).

A violation of the law in the belief in good faith that it is unconstitutional or that it is detrimental to mankind as a whole is no defense (*Warren* v. *United States*, 177 F. 2d 596, certiorari denied 338 U. S. 947). A finding that one who failed to report for induction has been 'loyal to the United States at all times' will not prevent conviction (*Shigeru Fujii* v. *United States*, 148 F. 2d 298, C.A. 10, certiorari denied, 325 U. S. 868 sub nom *Minola Tamesa* v. *United States*."

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The element just discussed; the fact that a depraved mind or purpose is not required for conviction; the possibility that conviction may be the result of ill-advice or misclassification; the fact that violation does not necessarily involve fraud and that it is an open act which of necessity is brought to the attention of law enforcement officials and which results not in evasion of service, but punishment, followed by further subjection to

service—all these matters compel the conclusion that the portion of the law under consideration does not define a crime which is base, vile or depraved."

The same may be said about Rubinstein! The immigration laws do not contemplate that "where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other" *U.S. ex rel. Mylius* v. *Uhl, supra,* 203 Fed. at 153. The crime of draft evasion does not necessarily require a fraudulent intent as the Board ruled in its most recent decision. In fact, Rubinstein committed no fraud, because fraud requires reliance by the defrauded party and the draft board never gave Rubinstein the occupation deferment which he requested.

The judicial test of moral turpitude is not "anything done contrary to justice, modest, or good morals", a definition cited by the District Court below with apparent approval (R. 9) but rather does the crime "in its nature imply personal depravity or baseness on the part of its perpetrator?" *U.S. ex rel. Mylius* v. *Uhl,* 203 F. 152, 154 (S.D.N.Y., 1913); affirmed 210 F. 860, (C.A. 2, 1914).

A neutral alien such as Rubinstein who was under no obligation to serve and in fact was under a deportation proceeding at the time, who seeks to avoid the military draft is not to be stamped as a depraved person. If one of our citizens sought to evade the draft in Russia, Germany, Italy or Japan or some other country during World War II and was convicted for such offense we would not regard him as depraved. We cannot apply different standards to the alien in our midst.

For the purposes of the present appeal it is neither necessary or appropriate to decide this question finally. On this appeal it is sufficient to determine (1) that the record is incomplete without the judgment of conviction, (2) that

the administrative decisions are contradictory and confused, and (3) there has been no judicial decision on whether the crime of draft evasion by a neutral alien involves moral turpitude subjecting the alien to deportation. It is submitted that in this state of the law the respondent makes out a sufficient case for a preliminary injunction.

E. Propriety of Injunctive Relief

We submit that the Court of Appeals properly granted injunctive relief and that the petitioner has not demonstrated that its decision should be reversed. Rubinstein was not required to establish his case finally and conclusively in order to be entitled to a preliminary injunction. Upon the undenied allegations of the complaint and supporting papers a case for eventual relief was established. Respondent has established the *prima facie* showing necessary for injunctive relief. *Ring* v. *Spina*, 148 F. 2d 647, 654 (C. A. 2, 1945); *Ross Whitney Corp.* v. *Smith Kline & French Laboratories*, 207 F. 2d 190, 194 (C. A. 9, 1953).

1. Injunctive relief is appropriate to restrain an illegal deportation order

In *Stark* v. *Wickard*, 321 U. S. 288 (1944), Mr. Justice Reed speaking for the majority of this Court acknowledged that injunctive relief was appropriate to restrain an executive order fixing milk rates. He said:

> "... the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternate remedy will enable petitioners to maintain their suit; but if the complaint does not rest upon a claim of which courts take cognizance, then it was properly dismissed."

Columbia Broadcasting System v. *United States*, 316 U. S. 407 (1942) held that Federal Communications Com-

mission's Regulations alleged to be improper, constituted a sufficient threat of cancellation to petitioner's contracts and therefore sufficient irreparable injury for injunctive relief. The enforcement of illegal orders of cabinet officers was held appropriate for injuctive relief in *Work* v. *Louisiana*, 269 U.S. 250, 254 (1925) and *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902). The threatened imposition and collection of inheritance taxes were held sufficiently imminent to justify injuctive action in *City Bank Co.* v. *Schnader*, 291 U. S. 24 (1934). Here the threat of enforcement of an order of a cabinet officer alleged to be illegal is as immediate, if not more so, as were the cases of *Stark* v. *Wickard, supra*, and *Columbia Broadcasting System* v. *United States, supra*. Threats of incarceration in civil proceedings like deportation are no less sacred than threats of monetary loss. Such threats based upon the enforcement of an illegal deportation order should have similar protection under the injunctive process and our judicial system. The issue then is whether the pleadings show a threatened invasion of a legal right which should be protected by the injunctive process.

It is clear that Rubinstein is entitled to injunctive relief to prevent violation of rights guaranteed to him by the due process clause of the Fifth Amendment of the Constitution. *Eisler* v. *Clark*, 77 F. Supp. 610 (Dist. of Col., 1948); *McGrath* v. *Potash*, 199 F. 2d 166 (C.A. D.C., 1952); *Barber* v. *Yanish*, 181 F. 2d. 492, 196 F. 2d. 53 (C.A. 9, 1952).

In the recent case of *Vergas* v. *Shaughnessy*, 97 F. Supp. 335 (S.D. N.Y., 1951) it was stated as follows:

> "Plaintiff is seeking an injunction pendente lite which if granted would stay all proceedings for deportation until a trial of the action has been had. Section 10 of the Administrative Procedure Act authorizes this relief where it is necessary to prevent irreparable injury. *It may be conceded that if the order of de-*

portation is null and void an arrest on a warrant issued thereunder is irreparable injury and it is no answer to suggest that a party subject himself to arrest and then seek redress by means of the ancient writ of habeas corpus.'' (Italics supplied).

We have shown that the actions threatened herein are illegal and that the order of deportation is invalid if the allegations of the complaint and the present record be accepted.

2. Detention is irreparable damage which equity will prevent

It is self-evident that detention and deprivation of personal liberty is irreparable damage. The modern equity doctrine is that personal and civil rights, as well as property rights, will be protected by injunctive relief. *Perry* v. *Perry,* 190 F. 2d. 601 (C.A. D.C., 1951); *Berrien* v. *Pollitzer,* 165 F. 2d. 21 (C.A. D.C., 1947); *Perkins* v. *Elg,* 99 F. 2d 408 (C.A. D.C., 1938); affirmed 307 U. S. 325 (1939); *Kenyon* v. *Chicopee,* 320 Mass. 528 (1946), 175 A. L. R. 466 (note on equity protection of civil rights); *Reeber* v. *Rossell,* 91 F. Supp. 108 (S.D. N.Y., 1950); *Local 309* v. *Gates,* 75 F. Supp. 620 (D. Ind., 1948); *Myerson* v. *Samuel,* 74 F. Supp. 315 (E.D. Pa., 1947: *Alesna* v. *Rice,* 69 F. Supp. 897 (D. Haw., 1947); *U. E. W.* v. *Baldwin,* 67 F. Supp. 235 (D. Conn., 1946).

The Courts have granted injunctive relief or bail to prevent the irreparable damage of detention pending judicial review of deportation proceedings. *U. S. ex rel. Cammarata* v. *Miller,* 79 F. Supp. 643 (S.D. N.Y., 1948); *Eisler* v. *Clark,* 77 F. Supp. 610 (Dist. of Col., 1948) cert. denied, 338 U. S. 879; *Yanish* v. *Phelan,* 86 Supp. 461 (N.D. Calif., 1949).

3. Balance of equities favor respondent

A court of equity will weigh the equities on either side in determining whether a preliminary injunction should issue. *Perry* v. *Perry, supra, Aldridge* v. *Franco Wyoming Oil Co.*, 9 F.R.D. 278 (D. Del. 1949).

In *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815 (1929) the proper rule to be applied in the disposition of preliminary injunction applications was stated as follows:

> "* * * where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction will usually be granted."

The Attorney General, by failing and refusing to suggest any reason for requiring Rubinstein's detention pending judicial review, offers nothing to be weighed in the scales of justice in his favor. On the contrary, the Government's concessions that Rubinstein is not a security risk and that no place of deportation has been determined weigh heavily in respondent's favor. Additional equities of the gravest weight for Rubinstein are that detention for an indefinite period of time pending recourse to the remedy of habeas corpus will be irreparable. Even if damages were available, and they are not, they would not begin to recompense Rubinstein for detention subsequently determined to be unlawful. There are no considerations of public interest whatever advanced by petitioner to be weighed against this irreparable damage of deprivation of personal liberty. In the circumstances the applicable equity rule requires a preliminary injunction.

4. Equity should preserve the status quo and protect acquired jurisdiction

The Administrative Procedure Act of 1946 under which this action is brought expressly authorizes interlocutory injunctive relief. Section 10(d) (5 U.S.C. 1009) provides that "to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

Equity will grant an injunction to preserve the status quo existing at the beginning of the litigation, where, as here, a change of status will irreparably damage one party. ***M. K. T. Railway Co.*** v. ***Brotherhood of Railway Trainmen,*** 188 F. 2d 302 (C. A. 7, 1951). In this case, in the absence of an injunction the respondent will not only suffer the irreparable damage of detention, but in addition, for all practical purposes, the jurisdiction of the District Court for the District of Columbia will be ousted. [See: *Kaminer* v. *Clark,* 177 F. 2d 51 (C. A. D. C. 1949)]. This action might become moot and Rubinstein would be relegated to habeas corpus in the district where he is arrested and detained. In these circumstances the status quo should be preserved by preliminary injunction. *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922); 28 *Am. Jur.* pp. 404, 409.

5. Duplication of suits should be prevented

Equity will grant an injunction to prevent an unnecessary duplication of suits. *Foodfair Stores* v. *Square Deal Market,* 187 F. 2d. 219 (C. A. D. C., 1951). Under this rule an injunction is appropriate here to prevent a second action

in habeas corpus to obtain the same relief first sought in this action.

6. *Equity should intervene to prevent an abuse of discretion*

The undenied allegation of paragraph 10 of the affidavit of counsel herein, submitted in support of the application for a preliminary injunction is as follows (R. 5):

> "That in all similar cases, the defendant has authorized the continuation of bail for persons similarly situated during judicial review, and defendant's denial of the continuation of bail herein constitutes an abuse of discretion."

This allegation has not been controverted. The Court must therefore at this state of the record proceed upon the assumption that there is such a general practice. (See footnote 23, *supra*, for illustrations of this practice). It follows from *U. S. ex rel. Knauff* v. *Shaughnessy*, 181 F. 2d 839 (C. A. 2, 1950) that the failure of the Attorney General to follow his general practice in the instant case constitutes an abuse of discretion. In the *Knauff* case the Second Circuit Court of Appeals held.[27]

> "8 U. S. C. A. § 154 gives the Attorney General discretion to determine when 'immediate deportation is not . . . proper'. By the adoption of an 'invariable practice,' he has established a class of situations with respect to which he has always so exercised that discretion as to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously, to abuse the administrative discretion."

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[27] On the subsequent appeal, 182 F. 2d 1020, Mr. Justice Jackson granted a stay of deportation pending a petition for certiorari, subsequently granted, 340 U. S. 940. In his opinion dated May 17, 1950 granting the stay, Mr. Justice Jackson stated: "Nothing has been produced to show why this particular petitioner should be so discriminated against" [deported pending judicial review]. (Opinion not officially reported but conveniently printed in *The Ellen Knauff Story*, pp. 152, 154.)

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Petitioner's conduct in seeking to detain respondent during judicial review is illegal as we have shown, and should be restrained by the intervention of equity's injunctive remedies.

Conclusion

Essentially and stripped of procedural aspects, the fundamental question presented on this interlocutory appeal is whether petitioner can detain Rubinstein "for deportation" pending judicial review of the deportation order, or whether Rubinstein must be in custody for six months before he can even question the validity of the order directing his deportation, even though:

1. Concededly Rubinstein is not a security risk.
2. Concededly the Attorney General does not intend to attempt deportation pending judicial review.
3. Concededly no place of deportation has been determined.
4. No public interest will be served by Rubinstein's detention pending judicial review.
5. No express statutory authority to detain pending judicial review exists.
6. Detention will make moot in this case the issue of legality of detention pending judicial review and relegate respondent to habeas corpus in which petitioner has argued in effect that the legality of detention pending judicial review cannot be raised.

Happily under our system of a government of laws and not of men, examples are not lacking of judicial intervention to prevent the executive from acting arbitrarily as both judge and jury and depriving an individual of his liberty. *Duncan* v. *Kakanamoku*, 327 U. S. 304 (1946); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); *Ex parte Milligan*, 4 Wall. 2, 120 (1866). This is not the first time this re-

spondent has been forced to seek judicial protection against *unreasonable and oppressive executive action*. In one instance the executive sought to exact bail of $1,000,000 as the condition of Rubinstein's liberty pending trial. *U. S. ex rel. Rubinstein* v. *Mulcahy*, 155 F. 2d 1002 (C. A. 2, 1946).

In the *Knauff* case, cited *supra*, in which the alien was finally released after suffering the irreparable damage of detention for a total period of more than a year, Mr. Justice Jackson granted a stay pending certiorari (340 U. S. 940) and used language applicable here (not officially reported but contained in the *Ellen Knauff Story*, p. 152):

> "It may well be that this removal will be sustained. But to consummate it while the right to do so is in litigation cannot be permitted, and to attempt to do so after a bill to forbid it has already passed one House by unanimous vote and while it is pending in the other is alleged to be a most unusual departure from administrative practice. Nothing has been produced to show why this particular petitioner should be discriminated against. To stand between the individual and arbitrary action by the Government is the highest function of this Court."

The order of the Court of Appeal should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes and Regulations Involved

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

Rule 57 of the Rules of Civil Procedure provides in part:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Section 10 of the Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. 1009, provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof.
>
> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas

corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

* * * * * * *

Section 10 (d) of the Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. 1009 (d) provides in part:

"Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

Section 12 of the Administrative Procedure Act, 60 Stat. 244; 5 U. S. C. 1011, provides in part:

"No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Section 242 (a) of the Immigration and Nationality Act of 1952 (66 Stat. 208; 8 U. S. C. 1252-a) provides as follows:

"*Pending a determination of deportability* in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General *and pending such final determination of deportability*, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or here-

after authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceeding against him *and detained until final determination of his deportability.* Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole *pending final decision of deportability* upon a conclusive showing in *habeas corpus* proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien *to determine deportability.*"

Section 242 (c) of the Immigration and Nationality Act of 1952 (66 Stat. 210; 8 U. S. C. A. 1252-c) reads in part as follows:

"When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or *if judicial review is had, then from the date of the final order of the court,* within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond, in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in *habeas corpus* proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period."

Section 405 (a) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U. S. C. 1101, footnote) provides in part:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or status, condition right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Section 11 of the Selective Training and Service Act of 1940 (50 App. U. S. C. 311) provides in part as follows:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules

regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.